U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

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CASE NOS. 1996-LHC-01748
1996-LHC-01976
2000-LHC-00055
2000-LHC-00056

OWCP NOS. 14-117567
14-121224
14-126064

In the Matter of:

RONALD L. JACOBSON,
Claimant,

v.

MARINE TERMINALS CORP.,
COLUMBIA GRAIN, INC.,
JONES STEVEDORING COMPANY, Self-Insured,
and
STEVEDORING SERVICES OF AMERICA,
Employers,

and

MAJESTIC INSURANCE COMPANY,
LIBERTY NORTHWEST INSURANCE CORP.,
HOMEPORT INSURANCE COMPANY,
Carriers,
and

ILWU/PMA WELFARE FUND,
Intervenor,

OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party-In-Interest.

Charles Robinowitz, Esq.,
For the Claimant

Delbert J. Brenneman, Esq., Hoffman, Hart and Wagner, L.L.P.,
For Marine Terminals Corporation and Majestic Insurance Corporation

Dennis R. VavRosky, Esq., VavRosky, McColl, Olson and Pfeiffer, P.C.,
For Columbia Grain, Inc., and Liberty Northwest Insurance Corporation

William M. Tomlinson, Esq., Lindsay, Hart, Neil and Weigler,
For Jones Stevedoring Company

John Dudrey, Esq., Williams Fredrickson, L.L.C.,
For Stevedoring Services of America and Homeport Insurance Company

Before: William Dorsey,
Administrative Law Judge

DECISION AND ORDER ON REMAND

I. Overview

Claimant, Ronald L. Jacobson, is 55 years old. He has had multiple employers in his work as a longshoreman, and multiple injuries. Identification of the employer which must pay his medical and wage loss benefits is the predominant issue in this case. After studying the many medical opinions submitted by Claimant's treating physicians and other physicians who have evaluated him for his compensation claims, I conclude that Marine Terminals Corporation, the employer Claimant worked for at the time of his injuries on August 31, 1994, and on January 9, 1996, remains the employer liable to pay all benefits. Claimant has never reached maximum medical improvement from the combination of his orthopedic and psychiatric injuries. Marine Terminals Corporation must not only pay the wage benefits, but provide a multidisciplinary, in-patient evaluation of Claimant's conditions and the treatment identified during that evaluation.

Claimant seeks medical benefits and disability compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, as amended by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 - 1655 (1984) ("the Act"), for injuries sustained on two occasions while employed at Marine Terminals Corporation (MTC). Judge Alfred Lindeman entered a decision and order awarding some of the benefits sought. The Benefits Review Board ("Board") reviewed that decision. During those review proceedings, Claimant returned to work, where he had a third injury. The Board ultimately remanded for further proceedings on Mr. Jacobsen's claim arising from his second injury. At about the same time, Claimant filed with the District Director a petition for modification of Judge Lindeman's decision under § 22 of the Act. MTC had denied responsibility for that second injury, contending that one of Claimant's subsequent employers,

Hall-Buck Marine, Inc. (Hall-Buck), Columbia Grain, Inc., Jones Stevedoring Company (Jones Stevedoring), or Stevedoring Services of America (SSA), is the responsible employer. All those Employers became parties, and each disclaimed any legal responsibility to pay benefits. Before the remand hearing convened, Claimant entered into a § 8(i) settlement with Hall-Buck, which was approved. Evidence on the issues raised in the Claimant's modification petition also was taken at the remand hearing, and this decision includes the issues raised in it.

The record medical evidence is extensive, yet inadequate. It convinces me that Claimant has not reached maximum medical improvement, so he remains temporarily totally disabled from his January 9, 1996 injury at MTC. He was said to have attained maximum medical improvement after two low back surgeries, and ready to return to work in early 1997, although with orthopedic restrictions. This single-minded focus on his orthopedic status ignored the psychiatric components of his work-related impairments, which were diagnosed as early as 1996 by his family practitioner, Moses Gallegos, D.O., and a neuropsychologist, Jack W. Davies, Psy.D. Claimant has required one in-patient psychiatric hospitalization, and his psychiatric conditions continue to require treatment. The medical record contains no adequate evaluation of the severity of those psychiatric impairments, or any finding that Claimant has reached maximum medical improvement from them, and I am persuaded that the psychiatric limitations affect his physical capacities. His treating family practitioner has been unable to arrange for consistent psychiatric care which an insurer would pay for, and Claimant has been unable to afford it on his own. Several evaluators, acting independently, have called for a multidisciplinary evaluation of and treatment for Claimant's condition, to address his chronic pain, overuse of anti-anxiety and pain medications, and psychiatric diagnoses, but this has never been done. I find it medically necessary for MTC to provide an in-patient multidisciplinary evaluation of Claimant, and to implement the treatment program developed there. Until this has been accomplished, it is impossible to reach the question of whether Claimant has any vocationally relevant permanent impairments, or has suffered a loss of earning capacity.

The evidence is adequate for me to find that MTC is the employer responsible to pay Claimant's temporary total disability benefits, and for his medical care. The medical evidence on whether Claimant's condition is attributable only to his injuries at MTC, or whether those injuries were aggravated or accelerated by jobs he was dispatched to when he unsuccessfully tried to return to work from April to July 1998 contains some contradictions. The final opinions of all the treating and evaluating doctors are unanimous. Those jobs did not aggravate or accelerate Claimant's back or neck impairments, and his May 2, 1997 hip injury at Hall-Buck resolved, without making his condition worse than it otherwise would have been. I adopt that view.

A. Details of the Prior Proceedings

The matter first was tried on May 13, 1997, before Judge Lindeman. Claimant alleged that he injured his neck and lower back on August 31, 1994, and again on January 9, 1996, while working at MTC. The Decision and Order Awarding Benefits entered on March 23, 1998 granted weekly benefits of $63.87, finding Claimant was permanently and partially disabled as a

result of the neck injury on August 31, 1994. CX 1 at 25.[1] Judge Lindeman found that a knee condition was neither related to Claimant's neck injury nor to the treatment for it, so it was not compensable. He also determined that on January 9, 1996 Claimant injured his neck and lower back at MTC in a separate work-related incident, which required Claimant to have two low back surgeries, and gave rise to psychological problems after that 1996 injury. No permanent partial disability compensation was awarded for the 1996 (second) injury because at the time of the hearing, Claimant had suffered no loss of earning capacity from it. CX 1 at 22. Claimant had then been back to work only about three weeks. Relief under § 8(f) of the Act was granted to MTC on the 1996 injury, but not on the 1994 injury. Claimant sought reconsideration of the decision, but Judge Lindeman did not modify his decision. CX 2.

Both Claimant and MTC sought review by the Board. Claimant argued he was entitled to permanent partial disability benefits for the 1996 injury, or at least a *de minimis* award for it. While the review had been pending, Claimant returned to work, and while he worked at Hall-Buck on May 2, 1997, he fell from a rail car and landed in gravel on his left side, injuring his hip. This hip injury gave rise to an additional (the third) work-related compensation claim, which became OALJ case 1999-LHC-0371. On March 24, 1999, the Board vacated Judge Lindeman's findings about the extent of the 1996 (second) injury.[2] The matter was remanded to an administrative law judge to reconsider the extent of Claimant's permanent partial disability from the 1996 injury, and if there was no wage loss, to reconsider whether a nominal award should be made; to re-open the evidence on the issue of Claimant's wages after 1996; and if Claimant had a permanent injury in 1996, to consider whether the responsible Employer/Carrier was entitled to reinstatement of the relief Judge Lindeman had awarded from the special fund for benefits due more than 104 weeks after Claimant ceased work on April 22, 1997. I believe the Board's remand requires me to consider anew the nature and extent of Claimant's injuries from the second injury he sustained at MTC.

Adding complexity to the various claims, Claimant petitioned the District Director under § 22 of the Act for modification of Judge Lindeman's permanent partial disability award for the 1994 injury, and for the denial of an award of permanent partial disability for the 1996 injury in March 1999. That petition for modification was ultimately consolidated with the remand proceeding from the Board. His third claim for compensation, the one against Hall-Buck, was consolidated for trial with the Board remand and § 22 modification petition in an order entered on November 4, 1999. These consolidated matters were assigned to me due to Judge Lindeman's

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[1]"TR 1997" refers to the transcript of the May 13, 1997 hearing, "TR" refers to the transcript of the August 16, 2001 hearing, "CX 1997" refers to Claimant's exhibits submitted in 1997, "CX" refers to Claimant's exhibits submitted in 2001, "MX 1997" refers to MTC's exhibits submitted in 1997, "MX" refers to MTC's exhibits submitted in 2001, and "SX" refers to SSA's exhibits.

[2]The Board affirmed the other findings, including the rejection of the claim that the knee injury was compensable, and the rejection of the testimony of union dispatcher Ronald Lewis in favor of the testimonies of vocational counselor Michelle Brooks, B.S., C.R.C., and union representative Richard Mann. These testimonies are summarized in the original decision.

retirement. *See Pigrenet v. Boland Marine & Manufacturing Co.*, 631 F.2d 1190, 1192 (5th Cir. 1980), *on reh'g en banc* 656 F.2d 1091, 1095 (5th Cir. 1981); *Strantz v. Director, OWCP*, 3 BLR 1-431, 1-433 (1981).

After the remand, MTC moved to join Claimant's subsequent employers, Columbia Grain, Jones Stevedoring, and SSA, alleging that one of them was responsible for Claimant's condition.[3] MTC contended that Claimant worked as a lift truck operator at Jones Stevedoring on June 22, 1997, as a switchman at Columbia Grain on July 21 and 22, 1997, and as a heavy lift truck driver at SSA on July 30, 1997. I granted MTC's motion on May 9, 2001 and joined those employers. All these claims did not go to hearing, however. Mr. Jacobson's Longshore Act claim against Hall-Buck was settled pursuant to § 8(i); the order approving that settlement was entered on August 3, 2001. 33 U.S.C. § 908(i). Claimant has acknowledged that he received $33,924.09 in indemnity benefits from Hall-Buck for time lost from work, and agrees that the employer found responsible for his neck and psychiatric injuries will entitled to a credit for this amount. Claimant's Closing Argument, pg. 6, lns. 9 to 11.

An evidentiary hearing on remand convened on August 16, 2001 in Portland, Oregon.[4] Claimant's exhibits 1 through 51 and 53 were admitted into evidence; exhibit 52 was rejected because it was delivered to the opponents only the day before the hearing, in violation of the prehearing order, without any valid excuse. MTC's exhibits 1 through 17 and 19 through 43 were admitted into evidence; I reserved a ruling on the admissibility of MTC exhibit 18. SSA's exhibits 1 through 6 and post-hearing exhibits 7 and 8 were admitted into evidence. Columbia Grain and Jones Stevedoring submitted no exhibits of their own. TR at 15, 28, 34. All parties stipulated that the Longshore Act applies; that MTC employed Claimant at the times of his 1994 and 1996 injuries; that Hall-Buck employed Claimant at the time of his May 2, 1997 hip injury; and that, if called, Columbia Grain's vice president and general manager, Randy Cartmill, would testify that six-pound consoles were used by switchmen employed at Columbia on July 21 and 22, 1997. TR at 216-17. MTC also stipulated that Claimant's average weekly wage was $1,170.91 at the time of his 1996 injury. I have accepted all these stipulations. In preparation for the hearings before Judge Lindeman and me, Claimant has seen a number of physicians for treatment and for evaluation. He also has been interviewed by several expert vocational rehabilitation counselors, whose reports or testimony are part of this record.

B. Unrelated Proceedings Filed by Claimant

Claimant filed a claim for disability insurance benefits under section 223 of Title II of the Social Security Act, as amended, (codified as 42 U.S.C. § 423) on April 16, 1998. He was evaluated by a psychologist, Jane Starbird, Ph.D., as part of the Commissioner of Social

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[3]MTC contends that as a subsequent employer, Hall-Buck may be responsible for Claimant's present disability rather than MTC. Claimant's settlement with Hall-Buck released it from all claims, so it is not a party here.

[4]The transcript title page erroneously indicates that the remand hearing took place in Long Beach, CA.

Security's development of evidence about that claim. The decision entered following a hearing before an administrative law judge found Claimant disabled as of May 7, 1997, in large part because the judge found Claimant incapable of sustaining the full range of sedentary work. He determined that Claimant was limited to work requiring the lifting of a maximum of 10 pounds, and could do no overhead reaching, or significant movement of the head.

II. Findings of Fact

The findings of fact in this decision are organized according to their main sources. The first are based on lay evidence, the next group are based on the medical evidence, and the last group are based on the vocational evidence. With the exception of the treating family practice osteopath, Dr. Moses Gallegos, Claimant sought treatment from or was evaluated by other specialists in series. Organizing medical findings by physicians and psychologists in the order Claimant saw them generally organizes the medical findings chronologically, but there is necessarily some interweaving of reports and findings by the various health care providers, so the presentation is not strictly chronological. It is not practical to discuss in this decision every item found in the medical evidence; I have concentrated on those which I regard as the most significant.

A. Lay Evidence

1. Claimant, his work and his injuries

Claimant's date of birth is September 7, 1946. He became a casual longshoreman in 1988, and is a member of the International Longshore and Warehouse Union (ILWU). TR at 130. His longshore work came from the daily posting of jobs at the hiring hall. He was not a steady employee for any one employer; he took most any job that became available. TR 128. Analyzed on a national basis, entry level longshore work is manual labor loading and unloading ships. It is rated as a very heavy work in the U.S. Department of Labor's Dictionary of Occupational Titles (DOT), as Stevedore II, DOT Code # 922.687-092. That means it requires exertion in excess of 100 pounds of force occasionally, 50 pounds of force frequently, and in excess of 20 pounds of force constantly. The work is rated as requiring a specific vocational preparation of 2, meaning it can be performed satisfactorily with training of up to 30 days, which is unskilled work. CX 44 at 333. As a worker gains experience, and qualifies as a Stevedore I, (DOT Code # 911.663-014), the position is rated in the DOT as a medium strength occupation, with a specific vocational preparation level of 5 (training or work experience of 6 months to 1 year), which is skilled work. Id. at 334. Longshore work requires constant reaching and handling, frequent stooping, crouching, fingering, and occasional climbing, balancing, kneeling, talking, and hearing. CX 44 at 333.

The Dictionary of Occupational Titles describes or characterizes jobs in the economy, it does not prescribe job duties. The duties of longshoring jobs at the employers which comprise the Pacific Maritime Association can be described more specifically than the ways the DOT

characterizes those duties. Collective bargaining documents[5] prepared jointly by the members of the International Longshore and Warehouse Union and the Pacific Maritime Association say that those who do longshore work "are required to do heavy physical labor in the holds, on the decks of ships and barges, and on the dock." CX 48 at 354. According to the Coast Labor Relations Committee, under the Memorandum of Coastwise Rules Covering Registration and Deregistration of Longshoremen and Clerks, the essential job qualifications are:

1. the ability to speak and understand commands and warnings in simple English;
2. to be physically fit, which includes:
   a. the strength to climb vertical ladders at heights in excess of 20 feet;
   b. the ability work in dusty, noisy areas and areas which expose the worker to irritating chemicals;
   c. the ability to stretch, bend, stoop, walk and arch; lift every conceivable kind of freight or equipment weighing up to 100 pounds; to lash boxes and crates, to climb over, around and under equipment, ropes, boxes, containers and freight, all on generally uneven surfaces;
   d. the ability to avoid dangerous circumstances; and
3. the ability to drive, push or manipulate dock equipment, such as slings, pallets ropes, chains clamps, forklifts, hand trucks, jeeps and tractors.

CX 48 at 355.

Using these capacities, a longshoreman loads and unloads cargo, with and without the aid of dock equipment. Longshoreman must:

1. physically lift, stack, push or pull cargo into position;
2. lash boxes or otherwise secure crates, logs, containers, and general cargo;
3. carry and move cargo from place to place on the ship or across the waterfront; and
4. drive mechanical motorized dock vehicles.

Id.

With these essential job functions, accommodation of workers with limited capacities is "often impossible," for there "are no tasks that can be carved out, reserved, isolated or guaranteed to a person." CX 48 at 356. It is neither "feasible [n]or possible to collect marginal longshoreman ... job functions and create new 'jobs.'" CX 48 at 357. Efforts to accommodate longshore union members who are limited in their capacities are handled through the dock preference board. Id. Such work is not available as a matter of right. The decision in *Willis v. Pacific Maritime Ass'n*, 236 F.3d 1160 (9th Cir. 2001) defines the limited circumstances in which an injured member of the ILWU may be placed on the dock preference board or its waiting list by a joint union/management Labor Relations Committee, or transfer into the separate marine clerks union in an effort to obtain less physically demanding work. These terms and conditions of employment are governed by a

[5] This is not the collective bargaining agreement itself, but a document created by a labor/management committee operating under that agreement.

collective bargaining agreement negotiated by the ILWU and the Pacific Maritime Association, rather than by the Americans With Disabilities Act, 42 U.S.C. §§12101-12113. See *Willis, supra*.

Shortly before he injured his neck at MTC on August 31, 1994, Claimant became a registered Class B longshoreman (B-man) in the ILWU. TR 1997 at 46-48. Because a January 1995 myelogram and a contrast-enhanced CT scan showed significant disc problems at the C3-4 level, where disc material was impinging on the spinal cord, Lawrence J. Franks, M.D. performed surgery on Claimant that month. The surgical procedures included a two level anterior discectomy and an interbody fusion at the C3-C4 and C4-C5 levels. TR at 109-10, 133; TR 1997 at 51; CX 1 at 3. As early as March 1995, Dr. Franks recorded in his chart notes that Claimant was frustrated with post-surgical pain. CX 1 at 3. Claimant began taking narcotic pain medications and sedatives for pain control. MX 20-1997 at 52; MX 22-1997 at 54. He also had a knee injury which was ascribed to his general cardiovascular fitness regimen, not to work or treatment for the neck injury. Dr. Franks considered whether Claimant ought to have more neck surgery at level C3-4, and a further anterior discectomy and fusion at the C5-6 level, but did not advise it. Dr. Franks authorized Claimant's return to work without restrictions as of September 11, 1995. SX 6 at 389, 393, 399. Claimant then returned to longshore work.

On January 9, 1996, Claimant re-injured his neck and injured his lower back while employed again at MTC, working that day as a gear lockerman, while hammering containers with a heavy mallet. TR 1997 at 58; CX 1 at 6. Claimant also suffered from left leg pain. TR 1997 at 60. He returned to the care of Dr. Franks on January 17, 1996, SX 6 at 396, and ultimately his condition required two lumbar surgeries. The first was a left L5-S1 discectomy and medial foraminotomy performed in late March 1996. MX 32 at 525; *see also* MX 32 at 522, 527, 532; SX 6 at 404. Then on August 30, 1996, he had a left L4-5 discectomy and foraminotomy to repair a herniated L4-5 disk. MX 32 at 531-32; 534. A myelogram done in connection with his back surgeries showed that the January 1995 neck fusion had not resulted in a proper union of the bone at the cervical levels intended to be fused.

Following these two low back surgeries Dr. Franks released Claimant to return to work as of January 27, 1997, CX 1 at 16, but with physical restrictions, which are discussed in § II. B. 1, below. Claimant actually returned to work only on April 22, 1997. TR 1997 at 60, 63-65, SX 6 at 414. The delay was actually authorized by the family practice doctor Claimant saw, Moses Gallegos, D.O., due to work-related anxiety and depression. *See* SX 3 at 107; CX 1 at 16, & text accompanying fn.16. He still had pain when he returned to work.

Claimant could not perform his job duties after his April 22, 1997 return to work. He depended on other longshore union members working during his shift to do his duties, or "carry" him. MX 34 at 625, 629.

On May 2, 1997, Claimant injured his left hip while employed at Hall-Buck when he slipped and fell from a slow moving rail car onto loose gravel. MX 36 at 643. When he saw his doctor shortly after that incident, his visit did not focus on the fall, but Claimant mentioned it, and complained of low back and left leg pain. CX 17 at 112. After the pain in his left hip had persisted through June and July, he returned to the doctor on August 1, 1997 "to establish a work

injury for left hip pain." CX 112 at 114. It was then diagnosed and treated as trochanteric bursitis. CX 14 at 114, CX 41 293. In neither of these visits did he say the Hall-Buck injury involved his neck. Between the time of his injury at Hall-Buck and the time he stopped work, Claimant worked as a lift truck operator at Jones Stevedoring on June 22, 1997, as a switchman at Columbia Grain on July 22 and 23, 1997, and as a heavy lift truck driver at SSA on July 30, 1997. Neck, back, and hip pain led him to quit working on July 31, 1997. CX 15 at 72; MX 34 at 625, 629. His hip pain eventually resolved with treatment, but he continued to suffer from neck pain and electric shock-like sensations. TR at 125-26, 133, 157. He could perform the master console job after he returned to work on April 22, 1997, which required minimal physical exertion, but he could not really do the switchman job, for the control console worn around his neck as a switchman aggravated his symptoms. TR at 120; 137-39; TR 1997 at 69. Claimant had estimated at his deposition that this console Claimant weighed 25 pounds. TR at 138. The more than fourfold difference in the weight as Claimant described it (25 pounds) and as all stipulated to it (6 pounds) is an example of the Claimant's tendency toward hyperbole in his testimony. While I do not take this as mendacity, it makes me cautious about accepting at face value all that Claimant says, especially about his symptoms and his limitations.

After he stopped working, his hip pain improved but the neck pain persisted, so Dr. Gallegos referred Claimant to three neurosurgeons: Kim Wayson, M.D., James F. Schmidt, M.D., and Edward Berkeley, M.D. Claimant had another discectomy and cervical fusion surgery on April 7, 1998, done by Dr. Berkeley (described below in § II. B. 8.), which relieved some of his pain. TR at 146. Things got worse for Claimant as time passed. After his fourth surgery (the multi-level cervical fusion surgery by Dr. Berkeley), Claimant returned to the hiring hall to get work after October 1998, but could not work even one of the 12 days required to qualify for disability benefits through the union, benefits which Claimant referred to as "workmen's indemnity" TR 115-119. He took jobs at the hiring hall on October 9, 10, 12, November 9 and 12, 1998, but on each occasion had to call for a replacement, so he earned no money. CX 49. Necessity then forced him to borrow money for living expenses from his son and from friends. TR 119.

The record is not as clear as it might be about when Claimant advanced in seniority in the ILWU. He testified at deposition that he became a Class A longshoreman (A-man) before he ceased working. MX 34 at 625, pg. 11, ln. 6. Apparently he became a Class A longshoreman on August 16, 1997 (MX 40 at 754), after his last day of work on July 31, 1997.

In spite of the hyperbole in his testimony, I find that after his second injury at MTC and two bouts of surgery on his low back, when he returned to longshore work after April 22, 1997, Claimant was unable to perform many of the jobs he took from among those he could get at the hiring hall with his seniority. He found at times that when he got to the job site, he could not perform the work, and had to call for a replacement worker to take his place. TR 116. This comports with the demanding description set out above of the essential job duties performed by longshore union members, and with the testimony of Mr. Holte (discussed in the next section) that even if a worker can secure through the hiring hall what passes for a light longshore job, it still will require lifting of 35 pounds.

Now Claimant's typical day involves taking a hot shower after arising, doing stretching exercises for about 20 minutes, watching television, walking his dog in the park, and shopping for groceries. He is unable to leave his home for significant periods, so he cannot secure employment. TR at 123. This has been his pattern since he stopped working in 1997, TR at 149, except for the days he unsuccessfully tried to work after October 1998. Claimant's memory has been poor since 1997. TR at 121.

2. Co-worker observations

Bruce Holte was Claimant's co-worker in 1997, and had known Claimant for a number of years. TR at 40. After Claimant returned to longshore work in April 1997, other longshoremen working on the same shifts as Claimant covered his job assignments. Id. Claimant and Mr. Holte worked together on May 30, June 19, and July 18, 1997, and Mr. Holte could recall distinctly one day when he covered Claimant's job assignment. TR at 41-42, 51, 56, 77. Mr. Holte believed that after April 1997 Claimant was incapable of working as longshoreman for two reasons: most jobs were physically too demanding for him, and those Claimant could handle were too difficult to secure. TR at 42-44, 48-49, 57, 60-63, 69-70. Even the lighter jobs at the waterfront occasionally required lifting in excess of 35 pounds, and those ordinarily are taken by the most senior longshoremen. TR at 50-51, 71, 73. Mr. Holte did not know which jobs had been approved by Claimant's physician, and he was not acquainted with any union policies pertaining to disabled workers. TR at 52-53, 57.

The testimony of both Mr. Holte and Claimant that Claimant's work had to be covered by other longshoreman on days between April 22, 1997 and July 31, 1997 makes good sense. Jobs available to Claimant on any given day after he returned to longshore work on April 22, 1997 depended on what jobs employers offered, and which of them Claimant could obtain through the hiring hall given his seniority. A robust and broad set of abilities are required to perform the duties of longshore jobs according to the collective bargaining documents. Dr. Franks, his back surgeon, assessed Claimant's capacities as well below those. I find that most of jobs required more physical exertion than he could handle.

B. Medical Evidence

1. Lawrence J. Franks, M.D.

Lawrence J. Franks, M.D., a neurosurgeon, performed three surgeries, one on Claimant's neck and two on his low back. CX 50-1997. The first procedure was a January 1995 cervical discectomy and fusion at level C3-5 after Claimant's 1994 injury. MX 32 at 537. The fusion ultimately proved to be unsuccessful. The vertebrae to be fused did not become solidly joined at the C3-4 level, and it is unclear if they did at the C4-5 level. MX 32 at 531, 539. Nonunion is a known risk in this procedure, especially among smokers (like Claimant). CX 16 at 81-82; MX 1 at 1; SX 6 at 390. Instability from the poor union may have caused Claimant pain and numbness in his left arm, a disk bulge and impingement of the nerve exiting the spinal column seen at the C3-4 level may have caused it, or the disk bulge seen at the next cervical level down (C5-6) may

have caused it. CX 16 at 84-91, MX 32 at 539. Even perfect immobilization of the C3-4 and C4-5 joints by fusion would have the effect of accelerating degeneration of the cervical joint levels above and below those fused. Adjoining upper and lower joints have to take up the redistributed motion, accelerating their own degeneration, which can lead to additional problems such as nerve root impingements there. SX 5 at 205. Just which of these caused Claimant's pain after the neck surgery in January 1995 is in doubt, but a number of objectively verifiable conditions he had were capable of causing it, and I believe that he had pain in both his neck and his left upper extremity which would limit his exertional capacity for work.

After Claimant's January 9, 1996 injury, Dr. Franks found a herniated disk in the low back at L5-S1 which was treated conservatively at first, due to Claimant's fear of surgery. MX 32 at 522. As this low back condition deteriorated, Claimant became frustrated by the pain and treated Dr. Franks' office staff angrily. Id. On March 28, 1996 Dr. Franks had to perform a discectomy and spinal decompression at the L5-S1 level on an emergency basis. MX 32 at 525, *see also* MX 32 at 522, 527, 532; SX 6 at 404. Claimant exhibited symptoms of depression after that surgery, which his family practice doctor (Dr. Gallegos) ascribed to continuing pain and stress. CX 1 at 6, citing MTC's first trial exhibit 40, at 88. A few months later, in August 1996, Dr. Franks performed another lumbar discectomy and medial foraminotomy at L4-5 (the level just above that of the first back surgery). MX 32 at 531-32; 534.

Following these three spinal surgeries, Claimant let his surgeon know that he was quite fearful of re-injury, especially when contemplating a return to longshore work. SX 6 at 416. Given the physical demands of longshore work described above, this is hardly surprising. Even after the two low back surgeries, in October 1996, Claimant continued to complain of lower back and left leg pain, MX 32 at 531, 543, and at times presented himself at Dr. Frank's office in an emotionally distraught manner. MX 32 at 531.

Dr. Franks knew by October 18, 1996 that cervical fusions from the surgery he had done were not solid at levels C3-4 and C4-5. MX 32 at 539. He considered another cervical fusion surgery, involving repeat decompressions at C3-4 and C4-5, with an anterior cervical discectomy at C5-6 and a 3-level fusion from C3 to C6, augmented with an anterior plate to repair the nonunion. Id. Dr. Franks rejected the idea, because he considered Claimant to be "impulsive" about surgery. CX 16 at 83-84, 106-07.

On the last day Dr. Franks treated Claimant, January 27, 1997, he released him to return to work. CX 16 at 89; MX 32 at 543. Claimant had work restrictions, however. By March 12, 1997 Dr. Franks had completed paperwork in which he approved a number of longshore jobs, based on his assessment of what Claimant should lift and do, and on descriptions of those jobs prepared by a vocational rehabilitation counselor. MX 6 at 80; SX 6 at 419. At first he thought Claimant could do jobs which required him to lift no more than 25 pounds. MX 6 at 80. He later refined this to limiting Claimant to lifting to 50 pounds for no more than 25 percent of the day, 25 pounds for no more than 60 or 70 percent of the day, coupled with the opportunity for frequent changes of position, and he restricted Claimant from work which required bending, stooping, and twisting over more than 50 percent of the day. SX 6 at 420-21. Dr. Franks approved these longshore jobs as consistent with Claimant's limitations: Secondary Master Console Operator,

Frontman/Slingman (Dockside), Tractor Semi-Dock, Lift Truck/Taxi Driver, Clerk/Checker (import yard), Locomotive Switch Operator, Barge Screw/Key, Packer/Container Top Loader/Side Loader, Log Loader Operator/Snapper, Auto Driver, Boatman (Safety Man), Dockman/Stickerman, Button Pusher, Crane Chaser, Hatch Tender (Signal Man), Lift Truck Operator, Utility Lift Driver, Gang Boss, Lift Truck-Heavy, Clerk/Checker (T4 Autos), Clerk/Checker (Dock), Supercargo, Walking Boss/Dock Foreman, Car (Grain) Controller, and Master Console Operator. MX 5 at 47-79. Not all of these jobs, *e.g.*, the walking boss and supercargo jobs, were available to Claimant given his experience and seniority level. Dr. Franks included Claimant's subjective pain complaints as a factor in giving approval for these jobs. SX 6 at 423. It does not appear that Dr. Franks was familiar with the general requirements for longshore work taken from the collective bargaining documents quoted in § II. A. 1. above (discussing Claimant's testimony), found in the evidence at CX 48 at 355. These limitations which Dr. Franks imposed on Claimant were inconsistent with the capabilities required to function successfully in longshore work.

Dr. Franks believed that jolting and turning the neck while driving, and wearing a console around the neck would probably cause Claimant temporary pain. CX 16 at 93-94, 97-100. When deposed in 1999, Dr. Franks was of the view that the work Claimant did after April 22, 1997 could cause him transient pain, but played no role in causing the last neck surgery done by Dr. Berkeley or Claimant's disability after September 1997. CX 16 at 97-101, 110.

2. Bryan H. Laycoe, M.D., and James M. Watson, M.D.

Orthopedic surgeon Bryan H. Laycoe, M.D., and neurologist James M. Watson, M.D., jointly evaluated Claimant on November 6, 1996 at the behest of MTC. Neither of them ever treated Claimant. Their evaluation took place after the neck and two low back surgeries Dr. Franks performed. MX 2 at 2. Drs. Laycoe and Watson reported they found no evidence of neurological impingement, and insufficient evidence that the fusion done by Dr. Franks had failed. They advised against a second cervical fusion, as well as further physical therapy, until the stability of Claimant's first fusion could be determined. MX 2 at 9-10. These evaluators suggested a self-directed exercise program for Claimant's lower back and cautioned that his continued use of narcotic pain medications would prolong his symptoms. MX 2 at 10. Both physicians concluded that Claimant's subjective complaints were not supported by any objective findings, and that Claimant was capable of working at the sedentary exertional level as of the time of their report; this limitation was subject to revision upon later testing of his physical capacities. MX 2 at 11, ¶ 4.

In April 1997, Dr. Watson approved the same longshore jobs Dr. Franks had approved. No further examination of Claimant or medical information formed the basis for Dr. Watson's opinion about the suitability of those jobs. MX 7 at 82-83. This make little sense to me. If Dr. Watson genuinely believed Claimant had no objectively verifiable basis for the symptoms he complained about, there was no reason to suggest in the initial report that Claimant be limited to the quite narrow range of work represented by sedentary jobs. If Claimant actually was limited to the sedentary level of exertion, longshore work was out of the question. If Dr. Watson gave a prophylactic limitation to sedentary work only until further investigation was completed (*i.e.*, until

it was known whether the cervical fusion truly was solid), then his approval of the jobs ought to have been given only after medical evidence about that contingency became available. Other studies, such as those discussed above by Dr. Franks, and below by Dr. Wayson and Dr. Berkeley, demonstrated the January 1995 fusion was not successful. Drs. Laycoe and Watson misapprehended Claimant's physical condition; they did not accept the important fact that the original neck fusions had never become solid at one, and perhaps at both levels. I regard their conclusions that objective findings (such as the results of radiologic investigations into the solidity of the fusion) failed to support Claimant's objective complaints as seriously flawed. I reject Dr. Watson's opinion about the jobs claimant could do. The conclusion that Claimant was capable of longshore jobs at the time of the November 6, 1996 and April 2, 1997 reports is unpersuasive.

3. Jack W. Davies, Psy.D.

Jack W. Davies, Psy.D., a neuropsychologist, evaluated Claimant on November 6, 1996, along with Drs. Laycoe and Watson on behalf of MTC, but wrote a separate report. MX 3 at 14; MX 58-1997. The Davies report states that it had two purposes: to determine whether there were psychological barriers to Claimant's rehabilitation, and to clarify the issues of differential diagnosis, treatment and compensability of Claimant's mental health condition. MX 3 at 14. Dr. Davies conducted a clinical interview, and reviewed records of Dr. Gallegos, but administered no psychometric testing. He described Claimant as "belligerent," MX 3 at 15, predominantly angry, and occasionally tearful. Id. at 15-16. This report is the better of the two reports in the record before me which evaluate the Claimant's psychological or psychiatric condition, because it assesses Claimant's problems in a detailed and disciplined way, rather than in brief passing comments. (The other was written by a Social Security evaluator, Dr. Starbird, and is discussed below in § II. B. 12). For the most part Dr. Davies followed the format for a report established in the Diagnostic and Statistical Manual of Mental Disorders-IV (Am. Psychiatric A'ssn. 1994), which uses five categories or "Axes" for assessment.

From that one interview and records review, Dr. Davies' primary diagnosis for Claimant on Axis I (clinical disorders) was a "[p]ain disorder associated with a general medical condition and psychological factors." MX 3 at 18. Next, he was unable to rule out malingering, but he did not make a finding of it either.[6] Id. Third, he diagnosed a dependence on narcotic pain medications and sedatives. Id. On Axis II (prominent maladaptive personality features[7]) he found a personality disorder with passive-aggressive and paranoid-suspicious features. In the discussion

[6] I realize this is contrary to Judge Lindeman's finding, CX 1 at 18. The report of Dr. Davies states "Rule out malingering..." To an author of a report using the DSM-IV format, this means the diagnosis was a provisional one, under consideration, but which requires further information or study to verify or to reject it. If Dr. Davies had flatly rejected the idea that malingering was involved, there would be no reason to mention a rejected diagnosis in his diagnostic impressions. The vocational expert, Mr. Katzen, who testified before me, understood the reference to malingering in this report in the same way I do. TR 189.

[7] Diagnostic and Statistical Manual of Mental Disorders-IV (Am. Psychiatric A'ssn. 1994) at 26.

of his findings he noted "some underlying dysthymia," but depression was not included among his Axis I diagnoses. MX 3 at 15, 18. Dr. Davies believed Claimant's psychological condition sustained his physical symptoms. MX 3 at 19. In essence he found Claimant was more psychologically impaired than physically impaired. He did not, however, offer a Axis V Global Assessment of Functioning (GAF) for the Claimant. A GAF score assigns a single numerical score ranging from 1 to 100, expressing a judgment about Claimant's overall level of functioning psychologically, socially and occupationally.[8] As occupational functioning is an important consideration in an assessments of whether Claimant was a good rehabilitation candidate, or whether he could return to his longshore work or to other work, this was an unfortunate omission.

It would have been helpful to have evaluated the effect, if any, the conditions diagnosed on Axis I had on work-related behaviors, such as Claimant's understanding and memory; his ability for sustained concentration, and Claimant's persistence. Factors considered under these rubrics would include his ability to understand, remember, and carry out detailed instructions; his ability to sustain focused attention and concentration; his ability to complete a normal workday and work week without interruptions; and his ability to perform at a consistent pace without an unreasonable number and length of rest periods from psychologically based symptoms. I would expect some evaluation of Claimant's ability to sustain social interactions on the job. This would include the ability to accept instructions and to respond appropriately to criticism from supervisors, and to get along with co-workers and peers without distracting them or exhibiting behavioral extremes. I want to know whether his condition would affect his adaptability, that is, his ability to respond appropriately to changes in the work setting. I have not identified these factors idiosyncratically. They are factors required to be evaluated under Chapter 14 of the then-current *AMA Guides to the Evaluation of Permanent Impairments*, 4th Ed. ("*AMA Guides*") in cases involving work-related mental impairments. The *AMA Guides* took these from the evaluative method used by the Commissioner of Social Security to decide disability applications when an applicant has psychological impairments. *See* Claimant's Social Security disability application file in evidence before me at SX 8 at 601-609, and the *AMA Guides*, 4th ed. at p. 293-295.[9] I have none of this type of information from Dr. Davies' report. The body of his report itself neither states, nor gives the impression that Dr. Davies concluded that the conditions he diagnosed on Axis I and Axis II lacked vocational impact.

As an alternative to the DSM-IV format chosen, Dr. Davies might have cast his evaluation of Claimant in the format prescribed in the 4th edition of the *AMA Guides*. Chapter 14 sets out elements for an evaluation report on mental behaviors and disorders, and the portion on assessing impairment severity requires an evaluation of a claimant's ability to perform activities of daily

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[8] Id. at 30-32.

[9]The factors listed in the 4th Edition of the *AMA Guides*, the version available to medical examiners at the time that they evaluated Claimant, are essentially the same as those found in the current 5th Edition. The 4th Edition included a detailed description of the factors the Social Security Administration uses to determine residual functional capacity as a suggested way to evaluate severity of mental impairments which has been omitted from the 5th Edition.

living; social functioning; concentration, persistence and pace; and potential for or history of deterioration or decompensation in work or work-like settings. Id. at 293-295, 299. Some estimate of the severity of diagnosed mental impairment is a prescribed element of a report under the *AMA Guides*, id. at 291, 299.

Dr. Davies thought that a pain center evaluation of Claimant would be useful, but doubted that Claimant would benefit from any multidisciplinary treatments or elective surgeries. MX 3 at 18-19. He recommended that all sedative and narcotic pain medications be discontinued, inasmuch as Claimant's "clear addictive qualities" rendered long-term treatment with such medications inappropriate. MX 3 at 19.

On April 9, 1997, Dr. Davies approved all of the longshore jobs that Drs. Franks and Watson had approved. MX 11 at 217. I accord this opinion no weight for a number of reasons. First, I cannot determine from the report what specific vocationally relevant limitations or restrictions Dr. Davies associated with the Claimant's psychological conditions as he diagnosed them. Second, I cannot tell whether Dr. Davies had been given any information about the psychological demands of the jobs posed to him as potentially appropriate ones. Evidence about the exertional[10] demands of the jobs had been provided to Drs. Franks and Watson, the physicians doing the orthopedic evaluations, *see* SX 7 at 84-114. Yet I find no indication that any descriptions of the psychological demands of those positions were given to Dr. Davies, or to Drs. Franks and Watson when they evaluated the physical requirements of the jobs. The reason to ask Dr. Davies to comment on the jobs would be to determine whether their non-exertional demands (*i.e.*, psychological demands) were within Claimant's capacities. I do not understand how the mere statement of the job titles would let Dr. Davies know the psychological demands of the jobs, any more than the doctors evaluating the physical aspects of the jobs would know their physical demands merely from the job titles. Both require some analysis of the jobs' demands from a vocational expert. Without evidence that Dr. Davies ever saw any descriptions of the psychological demands of the positions, Dr. Davies' opinion found in MX 11 is useless to me. Finally, the basis for Dr. Davies opinion that Claimant could perform the jobs the medical doctors had approved exertionally is not articulated – it remains a mystery. MX 11 was prepared by an attorney, which Dr. Davies endorsed by signing at its bottom. Without so much as a brief explanation of his thought processes which lead him to his conclusions, I have no idea how Dr. Davies made his evaluation of these positions.

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[10] Exertional demands are the seven strength demands of a job, *i.e.*, the job's requirements for sitting, standing, walking, lifting, carrying, pushing and pulling. *See* the U.S. Department of Labor's Dictionary of Occupational Titles (4th Ed., Rev. 1991) -- (APPENDIX C). They are important factors in determining whether a position is classified as a sedentary, light, medium, heavy or very heavy job. Limitations or restrictions which affect the ability to meet the demands of a job other than these seven strength factors are nonexertional limitations. Mental limitations are therefore nonexertional limitations. *See e.g.*, the taxonomy for evaluating the demands of jobs which the Commissioner of Social Security uses in determining disability under the Social Security Act, 20 C.F.R. § 404.1569a.

As a neuropsychologist, rather than a M.D. or D.O., MX 27, Dr. Davies could neither prescribe nor manage medications, so I regard his views on medication as being beyond his expertise. The main doctor eventually treating the Claimant's psychiatric symptoms by medication was Dr. Gallegos, whose records and opinions are discussed in the next section.

4. Moses J. Gallegos, Jr., D.O.

Moses J. Gallegos, Jr., D.O., an osteopath who is a board-certified family practice physician, began treating Claimant after the 1996 injury. CX 41 at 252-53, 256; MX 30 at 498-99. He is not trained as a psychiatrist. Dr. Gallegos himself characterized his training and experience in mental health care as "minimal," SX 7 at 452, 454, 487. His actions show he believed his medical background was adequate to treat Claimant for psychiatric symptoms and to prescribe psychotropic medications for depression and anxiety, as family practice doctors routinely do. Treatment of depression and anxiety is not reserved to psychiatrists. By November of 1996, the neuropsychologist, Dr. Davies, believed that Claimant had diagnosable psychological conditions on Axes I and II. Pain disorder associated with general medical conditions and psychological factors was his primary Axis I diagnosis. MX 3 at 18. This affords some independent corroboration of Dr. Gallegos' conclusion that Claimant needed treatment for his psychiatric condition, for Claimant had diagnosable psychiatric pathology. No party argues that Dr. Gallegos exceeded his legal authority to practice medicine by treating Claimant's psychiatric symptoms with psychotropic medications, in addition to managing other aspects of Claimant's medical care. I subscribe to Judge Lindeman's conclusion that Dr. Gallegos was competent to treat Claimant's psychiatric complaints. CX 1 at 17-18. Like Judge Lindeman, I also note that none of the physicians who examined the Claimant deny that there is some psychiatric component to his injuries (although not all address the matter). Dr. Gallegos has not, however, ever authored a detailed report in the standard DSM-IV format setting out his views about Claimant's psychiatric condition, and vocationally relevant limitations or restrictions. As he was not a forensic psychiatric examiner asked to focus on these matters, I do not expect the level of detail from him which I do expect from forensic psychological examiners such as Dr. Davies or Dr. Starbird.

Dr. Gallegos treated Claimant's psychiatric problems as a family practitioner because he has been the only doctor the Claimant could afford to see regularly. The charges for treatment by Dr. Gallegos are paid on Claimant's behalf. But if Claimant tries to see a psychiatrist, those charges are paid at only 20% of the amount billed to him. TR at 122. It is unrealistic in this circumstance to expect Claimant to see a psychiatrist regularly, however beneficial treatment by such a specialist, rather than by a generalist, might be.[11] Dr. Gallegos did refer Claimant to a psychiatrist,

[11]Testimony to the contrary by Dr. Vessely is discussed below in § II. B. 13. That orthopedic examiner thought that Claimant's psychiatric problems were too severe for a general practitioner to treat, and that Dr. Gallegos' treatment had relied on an inappropriately high level of pain medication. SX 6 at 334-335. If cost were irrelevant, I would be inclined to accept this opinion. Dr. Gallegos referred Claimant to psychiatrists, both in his referral to Dr. Gold in 1998 and to Advanced Pain Management Center in June 1999, both of which are discussed below. I infer from these actions his own belief that ongoing specialized psychiatric treatment for Claimant

Dr. Gold, in 1998 and again in 2000 to the multi-disciplinary Advanced Pain Management Center, but those bills were not paid in full either, and are part of the claim for medical expenses that I deal with in a later portion of this decision.

In the spring and summer of 1996, Claimant complained of depression, anxiety, lower back pain, and left leg pain related to his industrial injuries. CX 41 at 261-62 (April 1996); SX 7 at 461, 515. Dr. Gallegos prescribed the anti-anxiety medications Xanax and Ativan, CX 41 at 264, 267, 269, 274, 281, and anti-depressant medications amitriptyline (a generic for the tricyclic Elavil) CX 41 at 271-72, 277, 286, and later Paxil (a selective serotonin uptake inhibitor) CX 41 at 279, and recommended counseling and vocational rehabilitation. CX 41 generally at 264-91; SX 7 at 461. Dr. Gallegos did not impose any work restrictions then based on Claimant's psychological complaints; he released Claimant to work on April 22, 1997. CX 41 at 294; SX 7 at 461, 488.

Shortly after his return to longshore work, Claimant injured his hip while employed by Hall-Buck on May 2, 1997. On May 7, 1998 during an office visit meant to discuss Claimant's disability and renew medications, Dr. Gallegos restricted Claimant to three days per week of work, limited lifting to 20 pounds, and advised against repetitive bending, stooping, and twisting. CX 17 at 112, CX 41 at 295. Reading the treatment note from the visit, these limitations appear to be wholly unrelated to the fall. The doctor's note begins with the statement that Claimant came "to discuss his work options and his disability, as well as to get a refill on his medication." Id. At this first visit following the fall at Hall-Buck, Claimant did not focus on pain or limitations from the fall, he only mentioned it as a cause of his low back pain and left leg strain. Claimant's neck and arm pain had remained the same from February 1996 through June 1997. CX 41 at 296-97. On June 13, 1997, Claimant worked part-time with minimal pain, but he complained of transient neck and arm symptoms later that month. CX 17 at 113; SX 7 at 465. After the hip pain persisted into early August, Claimant did focus on the Hall-Buck work injury during an office visit, but he talked of an injury which was causing him radiating pain in the left hip. He did not characterize it as a source of neck pain, although his ongoing neck and arm pain had been the subjects of visits to Dr. Gallegos on May 7, May 21, June 13, June 25, and July 23, 1997. CX 17 at 112-114. Dr. Gallegos believed that any symptoms related to the May 2, 1997 hip injury were transient. Claimant had suffered previously from shock-like sensations and pain in his neck and arm, SX 7 at 491, 495-97, 522, so these were not new symptoms which only appeared after the hip injury. He took Claimant off work from August 1, 1997 (CX 41 at 321) to October 8, 1997 (CX 41 at 321, CX 17 at 117). Dr. Gallegos continued to believe Claimant suffered from anxiety and depression in August 1997, and treated him with medications such as Lorazepam and Paxil. CX 17 at 115.

By October 1997, Claimant had become frustrated with his workers' compensation claim. CX 17 at 119. He continued to suffer from neck, back, arm, and hip pain, but Dr. Gallegos believed

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was warranted. But cost is a factor, and Claimant and Dr. Gallegos have done their best, in my view, to work within Claimant's financial constraints. After this decision, however, MTC and its carrier will be required to provide appropriate specialty care and medication in pain management and psychiatry, as well as in orthopedics.

that most of Claimant's symptoms were psychological, CX 17 at 119, 122, 127. Dr. Gallegos did not remove Claimant from work on account of his psychological condition, however. TR at 210-12.

On April 7, 1998, Dr. Berkeley performed a discectomy and three-level fusion at levels C3-6, which included the placement of a titanium plate to stabilize the fusion of the three cervical joints. CX 31 at 94-95. (This is essentially the surgery Dr. Franks had considered in October 1996.) Claimant's psychiatric condition came to the fore then. In early May 1998 Dr. Gallegos' chart notes show he diagnosed anxiety and depression, which were ascribed to "his [*i.e.*, Claimant's] work injury and the complications thereof." CX 17 at 134. This diagnosis is related to Claimant's admission to a psychiatric ward through the emergency room with suicidal ideation in early May 1998 (discussed below). As the result of the instance of suicidal ideation, Dr. Gallegos explained to Claimant that he would not prescribe medications that could be used in suicide attempts, and so would discontinue prescriptions for Lorazepam, and narcotic pain relievers such as Roxicet. Id. Dr. Gallegos continued to believe Claimant suffered from depression and anxiety throughout the balance of 1998 and into 1999. CX 17 at 134-148. In early 1999 he attempted to find a way to get a psychiatric evaluation of Claimant, but could find no insurer to pay for it. MX 17 at 262; CX 17 at 145.

After Dr. Berkeley's retirement in late 1999, Dr. Gallegos treated Claimant's neck and back complaints. CX 17 at 148. Dr. Gallegos believed the 1998 neck surgery returned Claimant to his pre-1997 condition. SX 7 at 504. Claimant complained of sore throats and swallowing difficulties, however. Dr. Gallegos attributed this to the metal plate placed on the anterior aspect of the cervical spine by Dr. Berkeley.[12] TR 113-114, 126; CX 17 at 150 & MX 17 at 269.

Although his physical condition improved, Claimant's psychological condition worsened. SX 7 at 527-528. In June 1999 Dr. Gallegos referred Claimant to Advanced Pain Management Center, CX 17 at 150, but the bills for that treatment were only partially paid by Claimant's union health plan, rather than by an employer or an employer's insurance carrier. Apparently the union health plan terminated coverage at Advanced Pain Management on October 25, 2000. CX 53 at 461, entry for October 25, 2000. On July 30, 1999, Dr. Gallegos removed Claimant from work indefinitely, and stated the condition related back to July 30, 1997 (when Claimant had ceased work). CX 17 at 151; *see*, to similar effect, MX 17 at 262 from February 25, 1999. This July 13, 1999 retrospective authorization to be off work appears to be a valid exercise of hindsight on the doctor's part, as he had been treating Claimant during that period. I am persuaded by Dr. Gallegos opinion that a number of factors played a role in Claimant's anxiety and depression, and prevented him from working: his pain and limitation in his activities of daily living; his limited finances due to his inability to work and consequent dependence on disability payments; the paper-work related to Claimant's workers' compensation claim; and the ongoing need for medical therapy. CX 41 at 322; CX 17 at 134; CX 41 at 320, 322; SX 7 at 500-01.

5. Clyde A. Farris, M.D.

[12] Dr. Vessely agreed that the plate caused this difficulty. SX 6 at 279.

Clyde A. Farris, M.D., an orthopedic surgeon, examined Claimant on September 19, 1995 to evaluate his right knee, and reviewed additional medical records on April 8, 1997. MX 10 at 212; MX 26 at 487. Dr. Farris approved the same longshore jobs that Drs. Franks and Watson had approved. MX 10 at 212-15. The knee condition plays no significant part in this matter now, and the report is similarly of little significance.

6. Kim A. Wayson, M.D.

Kim A. Wayson, M.D. examined Claimant on September 2, 1997, on referral from Dr. Gallegos. SX 5 at 199, 202; MX 28. He never performed surgery on Claimant. Neck and left arm pain were Claimant's chief complaints then. Dr. Wayson found disc degeneration at the C5-6 level, a radiculopathy arising from the C7 level, and saw the nonunion at the site of the cervical fusion surgery attempted in 1995. SX 5 at 204-05. Dr. Wayson concluded that Claimant needed another cervical discectomy and fusion to repair the nonunion and concomitant degeneration, as well as to relieve his pain. SX 5 at 219-21. He attributed Claimant's ongoing pain, in part, to the tolerance he had developed from his use of narcotic pain medications. SX 5 at 233. He believed that none of Claimant's work activities from April to July 1997 contributed to his neck condition. CX 35 at 203; CX 38 at 230-31; SX 5 at 224-25, 243-46. I accept his conclusion that the unsuccessful 1995 cervical fusion surgery had destabilized other cervical vertebrae and necessitated another cervical fusion. SX 5 at 205-06, 226-27. The unsuccessful fusion by Dr. Franks had caused radiculopathy at the C7 level (below the level fused) as the lower joints had to take up the motion, accelerating degeneration in that lower level. MX 22 at 457-458; SX 5 at 204-208. This accounted for the Claimant's arm symptoms after that surgery.

7. James F. Schmidt, M.D.

James F. Schmidt, M.D., a neurosurgeon, evaluated Claimant for Dr. Gallegos on December 8, 1997, but provided no treatment. CX 27 at 183. Claimant described neck pain, left arm numbness, and left leg symptoms to him. CX 27 at 184. According to Dr. Schmidt, Claimant's congenitally narrow spinal canal (stenosis), cervical nonunion, extensive history of narcotic medication use, pain and numbness symptoms, and lengthy unemployment, taken together, complicated the evaluation. CX 27 at 187. He was not sure that further surgery would be helpful, as it was not clear to him there was ongoing nerve root compromise at the C6 or any other level which surgery could alleviate. He suggested a broad based multi-disciplinary evaluation by a rehabilitation doctor (physiatrist), physical therapist, occupational therapist, psychologist and social worker. Id. On February 17, 1998, Dr. Schmidt again evaluated Claimant, who complained of lower back and left leg pain. CX 29 at 189. Dr. Schmidt ultimately recommended that Claimant undergo a multi-disciplinary evaluation by a panel of medical and psychological professionals. CX 28 at 188; CX 29 at 189. This is further evidence demonstrating Claimant's need for a pain management program (which had first been broached in the report of Dr. Davies), and for consistent, specialized psychiatric care.

8. Edward W. Berkeley, M.D.

Claimant visited Dr. Berkeley on March 20, 1998, complaining of severe neck pain and electric shock-like sensations, as well as weakness and numbness affecting his left arm. CX 30 at

190. Dr. Berkeley diagnosed a nonunion at levels C3-C5, a prolapsed disc at C5-C6, and a narrow spinal canal (stenosis) at levels C3-C6, CX 30 at 192, all of which would be consistent with what Dr. Wayson found. On April 7, 1998, Dr. Berkeley performed a discectomy at C5-C6 (the level below that where Dr. Franks had operated), followed by a three-level cervical fusion (including the levels where Dr. Franks had operated), reinforced by the use of a metal plate on the anterior side of the cervical spine. CX 30 at 193; CX 31 at 194.

Although this second fusion became solid, and so was successful, Claimant complained afterward of shock-like sensations in his neck and pain in his lower back, left arm, and left leg. CX 33 at 198, 200. Claimant also complained in May 1998 that his "entire left side 'went purple.'" CX 33 at 199-200. Dr. Berkeley found "nothing wrong" with Claimant's neck, CX 33 at 199, but believed that Claimant was suffering from anxiety, depression, suicidal thoughts and needed psychiatric treatment. Dr. Berkeley reported these concerns to Dr. Gallegos twice: in May (MX 15 at 249), and again June 1998 (CX 33 at 200-201).

On July 31, 1998, after a final post-operative evaluation, Dr. Berkeley believed that Claimant had made an "excellent recovery," because his cervical neurological examination was essentially normal. MX 15 at 252. Claimant continued to suffer from lower back and left leg pain and occasional neck and left arm pain. MX 15 at 252. When he found Claimant had recovered from the surgery, Dr. Berkeley advised against any further longshore work, and excluded work requiring repetitive pushing, pulling, lifting and carrying with the upper extremities, with lifting and carrying restricted to 35 pounds, done only occasionally. CX 51 at 411; MX 15 at 252.

In commenting on causation, Dr. Berkeley believed the May 2, 1997 injury to the hip (at Hall-Buck) did not aggravate Claimant's neck condition, Claimant's 1997 work activities caused nothing more than temporary exacerbations of symptoms, and the 1998 surgery he performed was inevitable from the original neck injury and the unsuccessful 1995 cervical fusion surgery by Dr. Franks. CX 51 at 390-91, 416-19, 422-23, 435, 440. This is essentially the same opinion Dr. Wayson had expressed.

At one time Dr. Berkeley had given a different opinion. He wrote to counsel for MTC in August 1999 that Claimant's April 1998 cervical fusions were caused 75% by the injuries in August 1994 and January 1996 (both injuries at MTC), and 25% by the fall in May 1998 (at Hall-Buck). This necessarily implied a belief that the 1998 cervical surgery was not a natural progression of the 1995 (first) cervical surgery, but the result of a new injury sustained when he fell from the moving train car onto the gravel. MX 20 at 453. At his deposition, Dr. Berkeley explained that the letter had been based on statements made to him by the Claimant. He changed his view when he saw the notes Dr. Gallegos took on May 7, 1997, and August 1, 1997 in which Claimant had recounted his fall to Dr. Gallegos. The treatment note from the May visit, which Dr. Gallegos wrote a few days after the fall, records that Claimant complained of a strain to his left leg. The August note records that Claimant stated he suffered left hip pain when he stepped off a rail car and fell onto loose gravel. CX 51 at 413-14. Dr. Berkeley then changed his opinion attributing causation for the neck surgery partially to that fall at Hall-Buck, for Claimant had not complained contemporaneously about neck pain associated with that fall. Dr. Berkeley also acknowledged that if it is true, as I have found, that Claimant mostly relied on others to do his jobs, rather than perform them himself, when he returned to work after his low back surgeries, it

would be less likely that those jobs contributed in any way to the need for the cervical fusion surgery Dr. Berkeley did in April 1998. CX 51 at 423. Moreover, if Claimant had come to Dr. Berkeley before he had returned to longshore work (and thus never had the injury at Hall-Buck, or done work at the other employers), Dr. Berkeley still would have recommended the surgery he performed on Claimant's neck. CX 51 at 419. I find persuasive the explanations for Dr. Berkeley's final view, that the surgery he did was the natural progression of the original injury to the neck and the failed original fusion. It was not a consequence of the fall at Hall-Buck, or the work done at the other employers who are parties here.

9. Emergency Room Psychiatric and Physical Records

On February 21, 1998, before he saw Dr. Berkeley, Claimant visited the emergency room, complaining of sharp neck and lower back pain. SX 8 at 579. Claimant was treated and released. SX 8 at 580.

Not long thereafter, on May 13, 1998, a little more than a month following the cervical fusion surgery by Dr. Berkeley, Claimant returned to the emergency room, complaining of chronic pain. He also complained of paralysis, although he was able to move his arms and legs. Claimant was "extremely loud and agitated," and he requested assisted suicide. SX 8 at 569-72. The emergency room physician reported that, at times, "he is very tearful and begins to cry." SX 8 at 575. After a normal neurological examination, Claimant was given a tranquilizer and admitted to the psychiatric unit. SX 8 at 576-78. Douglas R. Luther, M.D., the attending psychiatrist, found that Claimant had a history of chronic pain and a dependency on narcotic pain medications. He also noted that Claimant's narcotic pain medications had recently been restricted. SX 8 at 577-78. The following day, Claimant was much improved. Dr. Luther diagnosed Claimant with recurrent major depression and an adjustment disorder, prescribed an anti-depressant, and released him. SX 8 at 569-72, 578. This diagnosis from the in-patient hospitalization also serves to confirm that Dr. Gallegos had been correct in his ongoing diagnosis of and treatment of Claimant's depression.

On May 27, 1998, Claimant again visited the emergency room after an altercation at the union hall. At hearing he described the incident as receiving a glancing blow to the side of his face, TR 148, while in the contemporaneous emergency room records, the attending physician recorded the Claimant's statement that he had been slugged one time in the right side of his jaw and that the blow glanced off into his right shoulder. SX 8 at 567. Claimant told the doctor that his left arm became numb at the shoulder, and he developed shock-like pains and tingling in the left upper extremity. Id. At hearing, Claimant later denied that any pain resulted from the incident. TR at 148.

On July 25, 1998, Claimant returned a fourth time to the emergency room, complaining of pain and bleeding in his mouth after a recent oral surgery. The emergency room physician examined Claimant's mouth, but found no evidence of bleeding or abscess. She diagnosed anxiety, but Claimant left without treatment. SX 8 at 565-66. This is a further, although minor, verification of Dr. Gallegos' ongoing diagnosis and treatment of anxiety.

10. Joel L. Seres, M.D.

Hall-Buck had a neurosurgeon, Joel L. Seres, M.D., examine Claimant. He reviewed Claimant's medical records on December 8, 1998, in preparation for an examination appointment which Claimant failed to keep. CX 36 at 205. He found that Claimant's "clinical picture is complicated by his psychiatric presentation, his tendency towards substance abuse and his apparent anger." CX 36 at 226. Dr. Seres found no evidence that the May 2, 1997 injury at Hall-Buck affected Claimant's neck or lower back. CX 36 at 225-26.

Dr. Seres then examined Claimant on February 3, 1999 for two hours, and reviewed his medical history. SX 6 at 355. Claimant was cooperative in the examination, but seemed confused. SX 6 at 355. At first, Claimant described hip pain, but he later denied any such pain; he also described minor neck pain and bothersome lower back pain. SX 6 at 355-56. Although he denied any severe depression, Claimant presented himself as worried about re-injury and described increasing difficulties in managing his anger. SX 6 at 357-58, 381.

The X-rays showed the metal plate pressed against Claimant's esophagus. SX 6 at 379. Dr. Seres also saw some evidence of spinal cord injury in the cervical region, but he found no evidence of radiculopathy. SX 6 at 380. He believed that Claimant's continuing pain symptoms were likely personality related, SX 6 at 376, that Claimant was capable of more physical activity, and that he could return to light work after completing a "multidisciplinary pain management program." SX 6 at 380-81. This recommendation is consistent with that made by Dr. Schmidt.

Even if Dr. Seres' suggestions were carried out, and Claimant was offered and completed a multidisciplinary pain management program, and regained the capacity for light work, he still would not be able to perform the demands of longshore employment. Dr. Seres opinion is consistent with Dr. Gallegos' opinion that Claimant needs multi-disciplinary treatment, including pain management and psychiatric treatment.

11. Robert D. Gold, M.D.

Claimant visited Robert D. Gold, M.D., a psychiatrist, on four occasions in 1998 and 1999. CX 40. He went on a referral from Dr. Gallegos. MX 17 at 263, CX 17 at 146. Claimant reported symptoms of depression and anxiety about his condition, and repeatedly requested pain medication. CX 40 at 242, 247. Claimant also expressed anger and frustration about his workers' compensation case and reported that his attorney had advised him to seek psychological treatment and return to work. CX 40 at 243, 245. According to Dr. Gold, Claimant presented initially as "psychologically naive," agoraphobic, and anhedonic, but appeared neither depressed nor suicidal. CX 40 at 237, 242. His initial assessment was that Claimant suffered from major depression or from a chronic adjustment disorder. He discussed with Claimant the benefits of taking an anti-depressant, which Claimant was hesitant about. CX 40 at 239. Dr. Gold provided Claimant with a referral to a psychologist, Dr. Merkel, for treatment which would not include pharmacologic management of his psychological condition, and advised him to discontinue his narcotic pain medications. CX 40 at 239, 244.

Claimant next saw Dr. Gold in March 1999, at the urging of his attorney, and after Claimant began taking Zoloft, on a prescription from Dr. Gallegos. CX 40 at 242. He did not appear

depressed to Dr. Gold on that day. Id. Dr. Gold made clear that he would not become involved in the workers' compensation dispute, but he was willing to treat Claimant's anxiety disorder, and prescribed risperidone. CX 40 at 243. When Claimant returned in about a month, he expressed frustration with the legal proceedings, stated he thought the Zoloft helped his impulse control, but the risperidone had not helped, and so the dosage was increased. CX 40 at 245. He returned in May 1999, unclear about what the risperidone was supposed to do for him, and reporting a side effect of urinary urgency. He continued to express fear that even a small auto accident could leave him paralyzed due to the condition of his neck. CX 40 at 248. Claimant has not had treatment from Dr. Gold on a consistent basis. There were questions raised in the treatment notes about who would be responsible for the Dr. Gold's fees. CX 40 at 246. This is a further indication of what I found in footnote 10, above, that Claimant's inability to receive consistent psychiatric care has complicated Claimant's recovery.

12. Jane Starbird, Ph.D.

Jane Starbird, Ph.D. is a licensed psychologist who provided a report of a consultative examination to the Oregon Disability Determination Service in January 1999, as part of Claimant's application for disability insurance benefits filed under the Social Security Act. SX 8 at 558; 20 C.F.R. § 404.1519. That state agency evaluates disability applications as a contractor for the Commissioner of Social Security. 42 U.S.C. § 421(a). Apparently no treating psychiatrist, such as Dr. Gold, was willing to do the examination, or willing to do it for the scheduled fee payment, for Social Security regulations prefer a treating doctor to serve as the examiner. *See* 20 C.F.R. § 404.1519h. Dr. Starbird interviewed Claimant and performed a mental status examination but she administered no psychometric testing. Her report states she had no medical records of any kind available for her review, id. She therefore never saw Dr. Davies' report; Dr. Gallegos treatment notes; Dr. Berkeley's treatment notes; the notes of Claimant's emergency room visits (including the report of the psychiatric hospitalization authored by Dr. Luther); Dr. Gold's office notes; nor the suggestions for multi-disciplinary evaluations given by examining Drs. Davies, Schmidt and Seres. The history of Claimant's symptoms and signs of a medically determinable psychological condition, and treatment for it, is found in these records. There was a wealth of psychological information Dr. Starbird might have reviewed, had the Disability Determination Service made it available to her. The implication from the governing Social Security regulation is that Dr. Starbird was paid to spend 60 minutes with the Claimant, 20 C.F.R. § 404.1519n. I assume she did the best she could with the little she had to work with, but I regard her conclusion as uninformed and superficial. I am not surprised that Dr. Starbird diagnosed no Axis I or Axis II disorders. I do not regard the failure of her report to find vocationally relevant limitations as an indication that they were not present then.

13. Jon C. Vessely, M.D.

Jon C. Vessely, M.D., an orthopedic surgeon, was the final physician to be called on to evaluate Claimant and review the medical record. He did so as a consultant for SSA. He performed no surgery and provided no treatment to Claimant. He evaluated Claimant on July 13, 2001, SX 2; SX 3 at 104; SX 6 at 260-61, when he found Claimant's memory to be poor and his responses to be slow. SX 3 at 107, 110; SX 6 at 265. Claimant appeared very depressed, and was

difficult to examine because he was so apprehensive of movement of his neck and back. Id. at 345. Claimant's pain complaints seemed sincere to him, and Dr. Vessely concluded that Claimant was not malingering, SX 6 at 267, 278, even though no objective evidence on physical examination supported the markedly diminished cervical and lumbar ranges of motion Claimant exhibited. SX 6 at 269-70, 284. Physical examination also failed to reveal objective evidence of any neurological deficit, and Dr. Vessely concluded that Claimant's left-sided numbness was inconsistent with any nerve impingement. SX 6 at 274-75, 330. Dr. Vessely thought that Claimant depended on muscle relaxants and narcotic pain medications. Id. at 266.

As for the May 2, 1997 injury at Hall-Buck, Dr. Vessely believed that Claimant's trochanteric bursitis had completely resolved, and he did not think that any work activities from May to July 1997 affected Claimant's condition. SX 6 at 281-83, 315, 323. The amount of pain medication Dr. Gallegos prescribed for Claimant in 1997 was such that Claimant would not have been capable of operating equipment on an eight hour work shift, or even of working at all, id. at 285-289; 345. Dr. Vessely also concluded that Claimant's pain symptoms and psychological condition remained unchanged from February to July 1997. Id. at 286, 332. Even though he is not a psychiatrist, Dr. Vessely confidently concluded that it was Claimant's psychological condition which prevented him from working, id. at 334, 343, because the psychiatric condition was compromising Claimant's physical capacities, id. at 344. Evaluation of this type of interaction of the physical and psychiatric is inherent in orthopedics, so I reject the implication that Dr. Vessely is unqualified to express such an opinion, because he is not a psychiatrist. The opinion bears a similarity to the findings of Dr. Davies, back in late 1996. If Claimant's medications were discontinued, and Claimant completed an in-patient pain center rehabilitation program, Dr. Vessely believed that from a physical perspective, Claimant would be able to perform light or medium work. Id. at 284-286, 334, 343-344. Whether this will prove correct remains to be seen. The opinion does reinforce the idea that Claimant is not at maximum medical improvement due to his psychiatric condition, and is the final voice in the chorus of doctors finding that a multidisciplinary approach to Claimant's treatment is necessary.

14. Ultimate Medical Fact Findings

In addition to physical impairments from the 1996 injury, Claimant has serious psychiatric impairments from anxiety and depression. I base this conclusion on the records or evaluations of Dr. Gallegos; Dr. Berkeley; the in-patient attending physician for Claimant's psychiatric hospitalization, Dr. Luther; Dr. Gold; Dr. Schmidt; Dr. Seres; and the testimony of Drs. Gallegos, and Vessely. The early findings of psychopathology in the report of. Dr. Davies are significant, whatever that report's other weaknesses. The mental impairments were present by the date of Dr. Davies' examination and report in November 1996, and even earlier, when Dr. Gallegos diagnosed depression in the summer of 1996. CX 41 at 261-62; SX 7 at 461, 515. They antedated Dr. Franks' determination that Claimant reached maximum medical improvement orthopedically in early 1997. An accurate assessment of Claimant's capacity for physical exertion is not possible yet, because his psychiatric condition interacts with, and diminishes, his physical capacities. The severity of the psychiatric condition has not been well documented, and his psychiatric condition has been inadequately treated. Claimant needs consistent treatment, through a multi-disciplinary approach. As determinations of a long term treating physician, the opinions

Dr. Gallegos gave -- that Claimant was incapable of working due to his psychiatric condition, and had been incapable of work since July 30, 1997 -- are highly persuasive to me. They appear consistent with the other psychological or psychiatric evidence in the medical record as a whole, and especially with the opinion of Dr. Vessely discussed immediately above in § II. B. 13. I accept them. Due to the inconsistent psychiatric care Claimant has had up to now, and the interactive effects of the psychiatric condition on Claimant's ability to perform physically, I am persuaded by the opinion shared by Drs. Schmidt, Seres and Vessely that Claimant requires multi-disciplinary evaluation and treatment. I accept Dr. Vessely's refinement to that opinion, that it should be handled as an in-patient evaluation. Until this is done, and the treatment plan developed there carried out, Claimant will not attain maximum medical improvement from the combination of his work-related physical and psychiatric impairments. Claimant's physical limitations simply cannot be assessed accurately without taking account of the psychological impairments which bear on his capacities.

C. Vocational Evidence

The determination that Claimant is not at maximum medical improvement makes most of the vocational testimony irrelevant. I will, however, discuss it briefly, for it illustrates the practical problems the Claimant has had from the failure to treat his psychiatric impairments adequately.

1. Andy Huckfeldt, M.A., L.P.C., C.R.C.

Andy Huckfeldt, M.A., L.P.C., C.R.C., performed vocational assessments on March 2, 2000 and July 5, 2001, on behalf of the Claimant, and testified before me. TR at 79, 83; CX 44 and 45, at 330-345. He is the only vocational expert to factor the psychological or psychiatric impairments into his evaluation of the Claimant's capacity for work. He stated that Claimant is incapable of working without psychological treatment, completing a pain management program, and a work conditioning program. CX 45 at 345; TR at 85. The interview he had with Claimant convinced him Claimant is unusually fearful of and anxious about re-injuring himself. This is consistent with what Dr. Vessely found in trying to examine Claimant, and with conclusion expressed by Dr. Vessely, and Dr. Gallegos. Drs. Schmidt, Seres, Vessely and Gallegos all have opined that Claimant should have a multi-disciplinary pain management evaluation and some program of treatment before he will be in a position to return to work. Mr. Huckfeldt thought Claimant's chronic pain, depression and anxiety symptoms would interfere with the ability to perform job functions sustainably over time, and impede his ability to concentrate and pay attention; plan activities; and initiate, organize and execute decisions, all of which would make it difficult to be productive. The psychiatric symptoms would also impair his relationships with others at work, such as peers and supervisors, and impede his ability to deal with stressful situations at work. CX 44 at 338. Mr. Huckfeldt nonetheless analyzed number of jobs in terms of Claimant's physical capacities.

In his reports, Mr. Huckfeldt expressed the view that, if Claimant completed a pain management program, an exercise program, and psychological counseling, he could perform light work "modified to avoid any exertion of force including lifting, carrying, pushing and pulling over 35 pounds, overhead reaching, climbing, and any repetitive bending stooping or twisting." CX 44

at 338-39; CX 45 at 344. Mr. Huckfeldt estimated that the 1996 injury reduced Claimant's earning capacity by 58.1 percent. He arrived at this assessment by comparing Claimant's work hours before and after the 1996 injury. CX 44 at 342.

I need not reach that analysis. Given the mental limitations Mr. Huckfeldt articulated from the medical evidence and his interview of Claimant, the Claimant is unemployable in the competitive national labor market for wages, at his past work or at any other work. Just how much Claimant would benefit from the various rehabilitation programs Mr. Huckfeldt identified is an empirical question. I believe the record substantiates that Claimant has significant psychiatric impairments which influences his physical condition. How much the mental impairments are related to psychopathology directly, and how much to the side effect of pain medication (as in the limitation in attention and concentration, and planning and carrying out activities) is more that I can parse out of this medical record. Only after completing an in-patient program will it be possible to determine his abilities. I cannot assume that Claimant now has the capacity for a narrowed range of light work. The evidence prevents me from concluding that Claimant has reached maximum medical improvement from his psychiatric impairments, and the interrelationship of the psychiatric and physical has kept him from reaching maximum medical improvement in the physical sphere. Claimant currently is incapable of either doing his past work, or any work in the competitive national labor market for wages, on a sustained basis.

2. Other Vocational Evaluations and Testimony

Scott T. Stipe, M.A., C.R.C., evaluated Claimant's employability from January 27, 1997, the date when Claimant reached maximum medical improvement following his 1996 surgery, to May 2, 1997, when Claimant fell while working for Hall-Buck. MX 39 at 738; MX 40 at 739-40. Mr. Stipe examined Claimant's medical records and a vocational assessment by Michelle Brooks, B.S., C.R.C.; however, he did not specifically include psychological considerations in his evaluation. MX 39 at 738; MX 40 at 749. Mr. Stipe concluded that "taking into consideration Drs. Berkeley and Gallegos' opinions, Mr. Jacobson would have had access to the same types and varieties of longshore work, as documented by Michelle Brooks previously." MX 39 at 741. I reject this analysis because I do not believe Mr. Stipe had enough information to work with. No physician had found Claimant at maximum medical improvement from his psychiatric impairments. Without an evaluation of nonexertional limitations from Claimant's psychiatric condition, no accurate of Claimant's physical capacities could be made.

Roy Katzen, M.S., C.R.C., performed vocational assessments on February 29, 2000 and July 18, 2001. TR at 158-59; MX 41 at 775. Mr. Katzen emphasized in his analysis the November 1996 opinion of Dr. Davies that malingering needed to be considered, and that Claimant's presentation impressed Dr. Davies as showing "significant conscious embellishment, in the pursuit of secondary gain." MX 40 at 749. This was significant because the report from Dr. Davies was the only report focusing on Claimants psychological condition which Mr. Katzen had to work with in his file. TR 185. But it failed to give any assessment of limitations from the psychological conditions Dr. Davies diagnosed. Mr. Katzen also knew Claimant was seeing Dr. Gold for psychiatric care, but knew of no vocational restrictions Dr. Gold had imposed. He erroneously believed Dr. Gallegos, the primary care physician, had not imposed any either, MX 40 at 749.

Yet Dr. Gallegos had found in July 1999 that Claimant had been psychiatrically disabled since the end of July 1997. He also considered the opinions of Drs. Berkeley, Franks, and Gallegos that Claimant was able to work at the medium level of exertion. TR at 185, 190, 197; MX 40 at 749, 786. He treated these opinions as finding there were no relevant psychological limitations in Claimant's ability to work. MX 40 at 749. I find this evaluation unpersuasive, as it fails to account accurately and adequately for the psychiatric impairments in the record.

Elayne G. Leles, M.S., C.R.C., performed a vocational assessment and labor market survey on February 18, 2000. MX 42 at 903. She reviewed Claimant's medical records, his 1999 deposition, his education, his experience, and Ms. Brooks's vocational assessment. MX 42 at 905-07. Ms. Leles identified several types of sedentary, light, and light-medium jobs that Dr. Seres considered appropriate for Claimant. MX 42 at 910-11, 926. Based on her survey of local employers, Ms. Leles concluded that Claimant was capable of earning at least $9.00 per hour. MX 42 at 911-25. No psychological limitations are factored into that job analysis, nor could they have been in the absence of a finding of maximum medical improvement for the psychological conditions. This evaluation is flawed, for the reasons stated above. It cannot adequately account for the limitations Claimant has in his physical capacities from his psychiatric symptoms.

III. Conclusions of Law

A. MTC's Joinder of Subsequent Employers

I must first identify the appropriate parties. Jones Stevedoring and SSA argue that Section 13(a) of the Act precludes the motion MTC made to join them as subsequent employers. SSA argues that MTC "stands in [Claimant's] shoes" and could join the subsequent employers only within one year after Claimant realized that his 1997 employment may have aggravated his condition.

Here is what Section 13(a) of the Act says:

> "the right to compensation for disability or death under this Act shall be barred unless a claim therefore is filed within one year after the injury or death. . . . The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment."

§ 13(a), *codified as* 33 U.S.C. § 913(a).

Congress has limited the time in which an employee may file a compensation claim against an employer, but said nothing about when one employer may make a claim against another. *See Bispham v. Jones Stevedoring Co.*, 35 BRBS 949 (ALJ 2001). The Act simply does not address the issue. Nothing in the text of § 13(a) bars MTC from joining Columbia Grain, Jones Stevedoring, and SSA as parties.

Jones Stevedoring argues that, if §13(a) is inapplicable, the doctrine of laches precludes MTC from joining subsequent employers. "The doctrine of laches is an equitable defense barring litigation of a claim that the plaintiff neglectfully or by omission failed to file in a prompt manner, if the lapse of time resulted in prejudice to the other party." *Logara v. Jackson Engineering Co.*, 35 BRBS 83, 89 (2001) (citation omitted). Since the merger of law and equity in the U. S. District Courts (and many state court systems), there is but one form of action, not separate actions at law and in equity. Rule 2, Fed. R. Civ. P., and the Advisory Committee Notes to Rule 1, Fed. R. Civ. ¶., 1937 Adoption, at ¶ 3. Lawyers therefore have become accustomed to raising equitable defenses routinely in actions which do not sound in equity. In situations where there is no statue of limitations, advocates will raise, as here, the claim of laches. But what judges in the Article III courts may do where the forms of action have been merged is not the measure of my power or jurisdiction. Neither the Administrative Procedure Act, 5 U.S.C. § 551 et seq., nor the substantive provisions of the Longshore Act grant an administrative law judge the powers of a court of equity. Equity courts could create and apply the doctrine of laches, but an administrative forum has no inherent authority to do so. If Congress did not create a limitation period for claims among employers, it is not up to me to create one. Even if the doctrine did apply here, Columbia Grain, Jones Stevedoring, and SSA were given ample time to prepare responses to the allegations against them. I accept in the next section of this decision their argument that a deposition taken of Claimant before they became parties is inadmissible. Thus, the lapse of time in making them parties to this claim has resulted in no identifiable prejudice to them, other than the cost and inconvenience of defending themselves. Accordingly, the doctrine of laches has no application here, either theoretically or practically.

More importantly, specific authority from the Benefits Review Board supports joinder of the subsequent employers in this case:

> When the potential liability of a later covered employer becomes apparent in the course of a trial, the judge must halt the trial and require the claimant to file a claim against the newly discovered potential defendant, who may then request a new trial.

Susoeff v. San Francisco Stevedoring Co., 19 BRBS 149, 152 & n.5 (1986), cited with approval in *Avondale Industries, Inc. v. Director, OWCP,* 977 F.2d 186, 190 (5th Cir. 1992); *see also Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286, 288-91 (1994) (citing 20 C.F.R. § 702.338 and holding administrative law judges have authority to join other employers); *Osmundsen v. Todd Pacific Shipyard*, 18 BRBS 112, 114-15 (1986) (holding timely notice to previous employer satisfies § 13 with respect to subsequent employers). Columbia Grain, Jones Stevedoring, and SSA, as potentially liable subsequent employers, were all properly joined as parties here.

B. Admissibility of MTC's Exhibit 18

Columbia, Jones Stevedoring and SSA object to admission into evidence of MTC's exhibit 18, a transcript of Claimant's 1999 deposition in this proceeding, inasmuch as they were not yet parties to this case, and had no opportunity to cross-examine Claimant at the deposition.

Columbia Grain, Jones Stevedoring, and SSA deposed Claimant in 2001, after they became parties, but then Claimant was unable to remember most of his previous testimony, rendering their examination of Claimant essentially useless. On these bases, Columbia, Jones Stevedoring and SSA seek to exclude the transcript of Claimant's 1999 deposition. MTC contends that the transcript may be admitted under the former testimony exception to the general provision barring hearsay evidence. 29 C.F.R. § 18.802. According to MTC, Claimant's poor memory rendered him unavailable in 2001 and as a result necessitates the admission of his 1999 testimony. *See* 29 C.F.R. § 18.804.

Claimant's 1999 deposition testimony is hearsay in the final hearing before me, but this does not mean it is inadmissible. The regulations governing hearings under the Longshore Act make the standards for the admission of evidence relevance and materiality. 20 C.F.R. § 702.338. I am constrained neither by "statutory rules of evidence [n]or by technical or formal rules of procedure," § 23 (a) of the Act, *repeated in* 20 C.F.R. § 702.339; *see also, Smith v. American University*, 14 BRBS 875, 879 (1982) (citations omitted). Those formal rules of procedure include, apparently, the Rules of Practice and Procedure for Administrative Hearing before the Office of Administrative Law Judges published at 29 C.F.R. Part 18, on the admissibility of evidence.

Columbia Grain, Jones Stevedoring, and SSA rely primarily on the argument that they had no opportunity to cross-examine Claimant when he still had a memory of relevant events, so admission of his 1999 deposition deprives them of due process. "An administrative law judge is obligated to admit all relevant and material evidence, subject to the limitation that the due process rights of potentially adversely affected parties must be protected." *Feezor v. Paducah Marine Ways*, 13 BRBS 509, 512 (1981) (citation omitted); *see* 29 C.F.R. § 702.338; *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75, 79 (1997)(to accept a post-hearing affidavit from claimant without permitting employer to cross-examine claimant is reversible error). This is based on the interpretation of the Constitution by the Supreme Court of the United States that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970). In adjudicating cases under the Longshore Act, I must adhere to constitutional norms.

If the ordinary rules of procedure applied, I would not admit the 1999 deposition of Claimant, for 29 C.F.R. § 18.22(d) limits those depositions which may be received into evidence. The regulation permits a party taking a deposition to offer it against "any party who was present or represented at the taking of the deposition or who had notice thereof" id., and as to Columbia Grain, Jones Stevedoring, and SSA, the earlier deposition of Claimant does not qualify. I could not say that the interests of these parties were represented by Hall-Buck, the only employer present at the 1999 deposition. Hall-Buck did not have the same motive in cross-examining Claimant, for Hall-Buck had yet to settle with Claimant and could have benefitted from evidence suggesting that Columbia Grain, Jones Stevedoring, or SSA was the last responsible employer.

29 C.F.R. § 18.22(d) does not control here, but serves as a useful guide. It reflects a judgement that it is simply unfair to offer a depositions as evidence against a party absent when

the depositions was taken, and neither had notice of it nor the opportunity to participate in it. Judge Huddleston reached a similar conclusion in a case requiring a determination of which employer was the last responsible employer, *Hurst v. Newport News Shipbuilding and Dry Dock Co.*, 35 BRBS 64 (2000) (ALJ). He excluded a deposition of the worker which was offered against an employer not noticed of the deposition. I disagree that the regulation is directly controlling, but find the reasoning for the exclusion persuasive on the alternative due process grounds Judge Huddleston gave. Due process cannot be accommodated here because the Claimant was in no meaningful sense available at the deposition taken after these later employers became parties. Things Claimant did testify about might be regarded as admissible admissions of a party opponent, but the main use of the Claimant's early statements is not as evidence against Claimant. MTC hoped to use that evidence against the later employers, not against Claimant. Admitting the deposition under the former testimony exception fails to deal with the due process problem, and so I do not admit the deposition. I exclude MTC's exhibit 18.

This ruling makes little, if any, difference to the outcome of this case. Admissible evidence is not the same thing as persuasive evidence. Claimant's memory at the 2001 deposition, and at the final hearing before me, was so poor that I would not be inclined to rely on much the Claimant said, in the absence of some corroboration. Even if due process were not a consideration, his poor memory would cause me to have doubts about the accuracy of what Claimant said in the 1999 deposition, and I would accord it little weight. "It is the sole province of the fact finder to determine the credibility of witnesses, including medical experts, and he may accept all or any part of their testimony according to his judgment." *Reese v. Weyerhaeuser Co.*, 8 BRBS 379, 383 (1978) (citation omitted). Claimant's memory was extremely poor at both the 1999 and 2001 depositions, and at the 2001 final hearing. Claimant was unable to remember either specific events or general time periods, he often required prompting from his attorney, he provided inconsistent responses, and he ultimately admitted that his memory had been poor since 1997. Dr. Vessely also found Claimant's memory poor during his examination of him. Because Claimant's testimonies provided after 1997 cannot be considered reliable, I give them limited weight.

C. The Disability Determination by the Commissioner of Social Security

MTC argues that the doctrines of collateral and judicial estoppel bar Claimant from arguing that the May 2, 1997 injury caused only a temporary disability, because the Commissioner of Social Security Administration awarded him total disability benefits based on that injury. Claimant counters that his present position is entirely consistent with the one he advanced at Social Security: "[Claimant] was permanently and totally disabled from April 22, 1997 to August 1, 1997; he was temporarily totally disabled from August 1, 1997 to July 31, 1998; and he has been permanently totally disabled since July 31, 1998." Claimant's Closing Argument at 25, October 15, 2001.[13] He says he was disabled at all times.

[13]That another attorney litigated the Social Security case makes no difference. Ordinarily, Claimant is bound by the acts of his attorneys. *See Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 689 (9th Cir. 1997).

The doctrine of collateral estoppel bars a party from revisiting an issue settled in a prior proceeding. *Weber v. S.C. Loveland Co.*, 28 BRBS 321, 324 (1994) (citations omitted). Collateral estoppel applies if an issue is identical to one raised and actually litigated in a prior proceeding, which was critical and necessary to the judgment rendered there. *Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (9th Cir. 1995). *See generally, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). Issues are considered identical if the same legal standards apply to both proceedings. *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291 (9th Cir. 1971); *Vodanovich*, 27 BRBS at 290-91.

The Social Security proceeding involved "disability," but the meaning of the word to the Commissioner of Social Security in administering her disability insurance program and to the Secretary of Labor in administering the Longshore program is not identical. The rather ungainly statutory definition for disability applicable to both Title II of the Social Security Act (for insured disability) and to the Supplemental Security Income program established by Title XVI of that Act, is found at 42 U.S.C. § 416 (i). The Commissioner of Social Security has adopted a five step sequential evaluation process to implement the statutory disability definition. 20 C.F.R. §§ 404.1505, 404.1520 (for claims filed under Title II), and 404.1602 (for claims filed under Title XVI). Compare that sequential evaluation with *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 59 (1980) (articulating the Secretary of Labor's standards for disability determinations under the Longshore Act). In the Commissioner of Social Security's disability determinations, the focus is on what a claimant still can do. Whatever caused a claimant's condition is irrelevant there. The Commissioner makes no determination about whether a disability is temporary, as opposed to permanent, or partial, as opposed to total, in the way the Longshore Act uses those terms. This difference in standards means the issues in the two proceedings were not identical.

Neither does the doctrine of judicial estoppel apply here. That doctrine precludes a party from taking incompatible positions during judicial proceedings to gain an unfair advantage. *Fox v. West State Inc.*, 31 BRBS 118, 122 (1997) (citation omitted). "Judicial estoppel applies to a party's stated position, regardless of whether it is an expression of intention, a statement of fact, or a legal assertion." *Helfand v. Gerson*, 105 F.3d 530, 534 (9th Cir. 1997) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991)).

An administrative law judge exercising the authority of the Commissioner of Social Security found Claimant was not disabled following the 1996 injury at MTC, but he became disabled following the May 2, 1997 injury at Hall-Buck, based on Dr. Berkeley's opinion that this injury "probably accelerated or exaggerated the underlying injury." CX 46 at 348. The language used in the Social Security decision does not indicate whether Claimant actually posited that the May 2, 1997 injury rendered him totally disabled, or whether he simply presented his evidence of disability without regard for the agency of causation. CX 46 at 346-51. As causation is not an issue in that forum, I doubt Claimant addressed it gratuitously. The only other evidence submitted from that case consists of medical reports and evaluations; there is nothing which

memorializes the arguments Claimant advanced there. SX 8 at 538-650. Accordingly, the doctrine of judicial estoppel does not apply.[14]

Although he contends that neither collateral nor judicial estoppel should apply to the determination of the Commissioner of Social Security, Claimant argues that I should treat the Commissioner's decision as evidence supporting a finding of total disability here. The Commissioner of Social Security applies a unique statutory definition of disability under Titles II and XVI of the Social Security Act. Her regulations specifically state that she will not be bound by disability determinations of other governmental agencies, 20 C.F.R §§ 404.1501 (a); 404.1504; 416.904. The Commissioner's determination that Claimant became entitled to Social Security disability insurance benefits on a certain date tells me little or nothing that is outcome determinative in this Longshore Act claim. *Jones v. Midwest Machinery Movers*, 15 BRBS 70, 73 (1982); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141, 145 (1978). I also note that Claimant criticized the decision of the Commissioner of Social Security in his Closing Argument, essentially arguing that the factual basis for the decision was erroneous.[15] It is odd for the Claimant to expect me to follow a decision he finds is flawed. The Social Security determination has little, if any, value as evidence on the issues before me.

D. The Settlement Between Claimant and Hall-Buck

Claimant argues that MTC failed to object to the settlement between Claimant and Hall-Buck and that, as a result, MTC is precluded from pointing to Hall-Buck as the responsible employer in an attempt to exonerate itself. Specifically, Claimant believes that the decision in *General Ship Service v. Director, OWCP*, 938 F.2d 960 (9th Cir. 1991), prevents MTC from shifting responsibility to an employer which is not a party in the case. According to *General Ship Service*, the employer named in an occupational disease claim may be presumed liable where, because of the passage of time, it is impossible to determine which of the claimant's potentially responsible employers was his last employer. Id. at 962. The *General Ship Service* decision never suggests that a claimant's voluntary settlement with one of the potentially responsible employers absolutely precludes the remaining employer from asserting a particular defense.

Other authorities, however, suggest that a nonparty employer may be found responsible for the claimant's injury, even though a settlement precludes a claimant from collecting any benefits.

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[14]For the same reasons, I reject SSA's argument that Claimant and MTC are bound by the Social Security Administration's finding that Claimant was unable to work because of his May 2, 1997 injury at Hall-Buck.

[15]For instance, Claimant states, "it is not clear why [Claimant] did not prevail on a claim that he was totally disabled for social security purposes from January 12, 1996. It is also not clear why the social security ALJ selected May 7, 1997 as the date of disability." Claimant's Closing Argument at 24, October 15, 2001. Claimant also states, "the social security ALJ did not have the complete medical record before him." Id. Then he states, "[t]he social security ALJ . . . never distinguished between temporary and permanent disability as he did not have to in his decision." Id. at 25.

See, e.g., *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999), *aff'd. sub nom. International Transportation Services v. Kaiser Permanente Hospital*, 7 Fed. Appx. 547 (9th Cir. 2001); *see also DiCarli v. General Dynamics Corp.*, 12 BRBS 946, 947-48 (1980) and *Ross v. Stevedoring Services of America*, 32 BRBS 240, 244 (ALJ 1998) (both barring recovery from first employer where claimant settled with last responsible employer). Whether MTC objected is inconsequential;[16] Claimant, who was represented by counsel, could have litigated his claim against Hall-Buck, but opted to settle. Accordingly, I conclude that MTC may point to Hall-Buck as the responsible employer.

E. Nature and Extent of Claimant's Disability

The nature and extent of Claimant's disability resulting from his 1996 injury are central issues in this case, issues the Benefits Review Board required the hearing on remand to address. Claimant did suffer work related neck and back injuries on August 31, 1994 and on January 9, 1996, which were not further aggravated by Claimant's work activities with subsequent employers in 1997. Physical injuries alone did not prevent Claimant from returning to work, however. Claimant's psychological condition, including Claimant's anxiety and depression arising out of the 1994 and 1996 physical injuries, have substantially contributed to Claimant's inability to return to work. CX 4 at 322.

Claimant has proposed a three-stage period of disability. Specifically, he seeks permanent total disability from April 22, 1997 to July 30, 1997,[17] temporary total disability from August 1, 1997 to July 31, 1998, and permanent total disability thereafter.

The employers, on the other hand, have competing views on the extent of Claimant's disability. MTC suggests in its written Closing Argument that there was no evidence that Claimant suffered a permanent partial disability as a result of the 1996 injury, and that he cannot receive disability as of April 22, 1997 because permanent total disability was not at issue at a May 13, 1997 hearing before Judge Lindeman.[18] Alternatively, MTC asserts that the testimony of Mr.

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[16]MTC maintains that it objected by letter on July 18, 2001. That letter shows MTC withheld objection to the settlement, as long as Claimant understood MTC would still point to Hall-Buck as a responsible employer at trial. I find it disingenuous for Claimant to claim a lack of objection, when MTC accommodated Claimant by not objecting, subject to the understanding that it would continue to point to Hall-Buck as a responsible employer. MTC fully preserved its position in its letter.

[17]Claimant seeks permanent total disability benefits from April 22, 1997 to August 1, 1997. Although he returned to work during that time, Claimant asserts that he could not perform the work he had been hired to do. He claims other longshoremen covered his job assignments, that he took "significant pain medication" which impaired his ability to work, and that on May 7, 1997, Dr. Gallegos restricted him from lifting any more than 20 pounds.

[18]MTC may be correct that Claimant never raised the issue of permanent total disability before Judge Lindeman or before the Board, but it is not correct to say he never raised it. He asserted the claim in his July 13,

Holte should be rejected in favor of those of the medical experts and vocational counselors, and that Dr. Gallegos's physical restrictions should be rejected in favor of those imposed by Drs. Franks and Berkeley. Jones Stevedoring, Columbia Grain and SSA argue, among other things, that Claimant's employment in 1997 did not aggravate, accelerate or worsen his condition.

The standards for applying the types of disability created by the Act are explained in *Stevens v. Director, Office of Workers' Compensation Programs*, 909 F.2d 1256, 1259 (9th Cir. 1990). I must consider the nature of disability (*i.e.*, whether it is temporary or permanent), as well as the degree of disability (*i.e,*. whether it is partial or total). Whether an employee reaches maximum medical improvement determines the nature of disability, while the availability of suitable alternative employment determines the degree of disability. *Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs*, 629 F.2d 1327, 1328 (9th Cir. 1980). A claimant is considered permanently disabled only "when [a claimant's] condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *SGS Control Services v. Director, Office of Workers' Compensation Programs*, 86 F.3d 438, 443-44 (5th Cir. 1996).

In making my conclusions about the nature and extent of Claimant's disability, I have chosen to characterize his disability in a way not proposed directly by any of the parties. It resolves the issue of the nature of the disability in a less complicated manner than the parties have proposed, and leaves the determination of the extent of disability for later determination, on a fuller medical record.

I find that Claimant is entitled to temporary total disability compensation based on the physical injuries he suffered on January 9, 1996 in his employment of MTC, and the accompanying psychological effects of those injuries. There has been no detailed evaluation of the extent and effect of the Claimant's psychological impairments. In November 1996, not very long after the second low back surgery (at L4-5) which Dr. Franks perfromed in August 1996, Dr. Davies made Axis I diagnoses of "[p]ain disorder associated with a general medical condition and psychological factors" and a dependence on narcotic pain medications and sedatives MX 3 at 18. These were related to his physical injuries at MTC, for the prominent aspects of is general medical condition were his unsuccessful cervical fusion, and two recently completed low back surgeries. On Axis II, Dr. Davies found a personality disorder with passive-aggressive and paranoid-suspicious features. There is no evidence Claimant had reached maximum medical improvement from these psychiatric conditions. As I pointed out above, in 1999 Dr. Gallegos found that Claimant was unable to work for psychological reasons as of July 30, 1997 when Claimant had ceased work. CX 17 at 151; *see also*, to similar effect, MX 17 at 262 from February 25, 1999. Because Claimant has not reached maximum medical improvement psychiatrically, I cannot determine whether the disability during the period from April to July 1997 should be divided into the categories of permanent

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2001 Pretrial Statement, which he had been required to submit before the evidentiary hearing on remand. Pretrial Statement of Ronald Jacobson, dated 7/13/01, at ¶8. Every employer received this statement of Claimant's contentions before the evidentiary hearing on remand began. They had the opportunity to present evidence on the issue, and the opportunity to address the issue in its written closing argument. There is no valid procedural objection to considering and deciding this issue.

partial or permanent total disability. The same remains true for the period from July 31, 1998 to date.

1. Physical condition

In establishing a prima facie case of total disability, the claimant bears the burden of proving that an industrial injury keeps him from his usual employment. *Elliot v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). If a claimant is able to perform his usual work, he still may establish total disability if he proves that he worked only through exceptional effort or with the indulgence of a beneficent employer. *Warren v. National Steel & Shipbuilding*, 21 BRBS 149, 153 (1998); *Hughes v. Litton Systems, Inc.*, 6 BRBS 301, 304 (1977). If the claimant successfully carries this burden, the burden then shifts to the employer to establish the existence of suitable alternate employment. *Trask*, 17 BRBS at 59. Once the employer establishes that suitable alternate employment exists, the burden shifts back to the claimant to prove a diligent search for employment and a willingness to work. *See Hooe v. Todd Shipyards Corp.*, 21 BRBS 258, 260 (1988); *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248, 253 (1987). The claimant's disability is partial, not total, if he fails to meet this burden. *See* 33 U.S.C. § 908(c); *Southern v. Farmers Export Co.*, 17 BRBS 64, 67 (1985).

I reiterate that Claimant could not and did not do his longshore work when Dr. Franks returned him to it with restrictions, following his two low back surgeries. Although Dr. Franks released Claimant back to work on January 27, 1997, Claimant did not actually return to work until April 22, 1997. His absence from work was excused by Dr. Gallegos, who believed Claimant was experiencing work-related anxiety and depression. SX 3 at 107. Even when he did return to the hiring hall, Claimant did not exhibit the physical capacity Dr. Franks had predicted, but depended on other longshoremen to cover his work duties for him. See § II. A. 1 and 2. above, and MX 34 at 625, 629. He was incapable of sustaining longshore work. I have also credited Dr. Vessely's conclusion that the amount of pain medication Dr. Gallegos prescribed for Claimant in 1997 was such that Claimant would not have been capable of operating equipment on an eight hour work shift, SX 6 at 285-289, or even of working at all, id. at 345. Claimant's pain was obviously related to the combination of the psychiatric and physical difficulties he had.

Soon after he returned to work in April,1997, Claimant injured his hip while working for Hall-Buck. MX 36 at 643. I find that the hip injury did not affect, accelerate or combine with Claimant's preexisting neck and back injuries to make them worse. Dr. Gallegos restricted Claimant to three days per week of work, limited lifting to 20 pounds, and advised Claimant against repetitive bending, stooping and twisting at about the time of the Hall-Buck injury (CX 41 at 295), but these limitations had their source in the earlier neck injury, not the Hall-Buck fall. Dr. Gallegos believed that any symptoms related to the May 2, 1997 hip injury were only temporary. Dr. Wayson opined that Claimant's work activities in 1997 did not contribute to his neck condition. CX 35 at 203; CX 38 at 230-31; SX 5 at 224-25, 243-46. Dr. Berkeley testified that the May 2, 1997 injury at Hall-Buck caused nothing more than temporary aggravations of his symptoms, and that Claimant's 1998 surgery was inevitable from the original neck injury and the unsuccessful 1995 cervical fusion. CX 51 at 390-91, 416-19, 422-23, 435, 440. Following the three level cervical fusion he performed, Dr. Berkeley advised against further longshore work and

restricted Claimant's lifting to 35 pounds, to be done on an occasional basis. CX 51 at 411; MX 15 at 252.

Just as the May 2, 1997 fall onto the left hip at Hall-Buck did not affect Claimant's preexisting neck and back injuries, Claimant's work activities for Jones Stevedoring on June 22, 1997, for Columbia Grain on July 21 and 22, 1997, and for SSA on July 30, 1997 also did not aggravate his condition. The issue of the responsible employer is discussed in greater detail in the following section. The latest examiner, Dr. Vessely, also believed that Claimant's hip condition had completely resolved and that Claimant's work activities from May to July 1997 did not affect Claimant's condition. SX 6 at 281-83, 315, 323.

All of these opinions lead me to the conclude that Claimant suffered serious neck and back injuries while in the employ of MTC, but that these injuries were not aggravated by his work with the subsequent employers in 1997. This does not end the inquiry, for I must also examine Claimant's psychological condition resulting from the 1994 and 1996 neck and back injuries. I believe his psychiatric condition is directly related to his physical condition, and together they have prevented Claimant from returning to work on a sustained basis.

2. Psychological condition

Claimant has an extensive history of serious psychological problems that arose directly from his 1994 and 1996 injuries with MTC. SX 7 at 528. Psychological consequences of his physical injuries have contributed to his inablity to sustain a return to work.

Earlier I set out the long list of medical reports and opinions memorializing Claimant's psychiatric problems. I believe it is worthwhile, however, to catalog this wealth of evidence under one heading to draw attention to how pervasive it is in the medical record, when it becomes a separate focus of analysis, rather than taken merely as an adjunct to the neck and back injuries. Dr. Davies diagnosed psychopathology on November 6, 1996 but neglected to address the extent of Claimant's disability or the limitations these conditions imposed on his ability to work. These diagnoses pre-dated the return to work date given by the neck and back surgeon, Dr. Franks, who had focused solely on the orthopedic, without factoring psychiatric limitations into his determination that Claimant could return to work.

In addition to Dr. Davies's report, Dr. Gallegos repeatedly referred to Claimant's psychological problems in the treatment notes. According to Dr. Gallegos, Claimant's depression and anxiety arising from his industrial injuries prevented Claimant from returning to work after Dr. Franks had cleared him in January of 1997. CX 17 at 134; CX 41 at 320.

Dr. Berkeley, while finding "nothing wrong" with Claimant's neck after healing from the three level fusion in 1998 (CX 33 at 199), nevertheless believed that Claimant was suffering from anxiety, depression, suicidal thoughts and required psychiatric treatment. He reported his concerns to Dr. Gallegos twice: in May 1998, MX 15 at 249, and again in June 1998, CX 33 at 200-201.

Dr. Schmidt, the neurosurgeon who evaluated Claimant on December 8, 1997 and February 17, 1998 for Dr. Gallegos, recommended a broad based multi-disciplinary evaluation by a rehabilitation doctor (physiatrist), a physical therapist, an occupational therapist, psychologist and social worker. CX 27 at 187. He recognized the Claimant's limitations did not arise solely from his orthopedic conditions.

Dr. Gold, a psychiatrist, evaluated and treated Claimant on four occasions in 1998 and 1999 on referral from Dr. Gallegos. CX 40; MX 17 at 263; CX 17 at 146. Although Claimant could not see Dr. Gold for treatment on a consistent basis for financial reasons, Dr. Gold was able to assess Claimant's psychological condition and to prescribe a number of anti-depressants to treat what he saw as a chronic adjustment disorder or a major depression. CX 40 at 239.

Dr. Seres, another neurosurgeon, reviewed Claimant's medical records and examined him on February 3, 1999, and concluded that Claimant's 1997 injury at Hall-Buck had resolved. CX 36 at 225-26. He thought Claimant was physically capable of more physical activity, and his continuing pain symptoms and inability to work were likely personality related, which is another way of saying they were related to Claimant's Axis II diagnoses. SX 6 at 376. Like Dr. Schmidt, Dr. Seres also recommended a multi-disciplinary pain management program. SX 6 at 380-81.

Finally, after examining Claimant on July 13, 2001, Dr. Vessely opined that Claimant's hip condition had completely resolved, and that from a purely physical perspective, Claimant should have been able to perform at least light if not medium exertional level work. It was Claimant's pain symptoms and psychological condition that prevented him from working from returning to work. SX 6 at 334, 343. Dr. Vessely believed Claimant requires an in-patient pain center rehabilitation program, rather than the outpatient treatment that Claimant had already received. Such treatment would not be duplicative of the limited treatment Claimant had at Advanced Pain Management Center.

Although many of these medical examiners realized or suspected that Claimant was suffering from psychological problems, none evaluated the limitations arising from the psychiatric diagnoses in a disciplined way. Dr. Gallegos gave a very general, global opinion that Claimant has been disabled since July 30, 1997. CX 17 at 151. From my review of the evidence, no examiners besides Drs. Davies and Dr. Starbird evaluated Claimant's psychological conditions in reasoned reports, but their reports each suffered from significant flaws. No treating physician or evaluator offered an opinion that Claimant has reached maximum medical improvement for his psychiatric conditions, or on what course of psychiatric treatment would bring Claimant to maximum medical improvement. Due to his financial constraints, Claimant has received limited outpatient pain management treatment, although he ought to have had inpatient evaluation.

Ample evidence from medical and psychological examinations done over time confirm that Claimant's psychological condition has warranted further evaluation and multi-disciplinary treatment. I order the responsible employer, MTC, to provide Claimant a multi-disciplinary

inpatient evaluation and pain management program.[19] Although Dr. Davies doubted the benefits that would be achieved by a multi-disciplinary evaluation, I find that such an evaluation is medically necessary to determine the extent of Claimant's disability and to develop an appropriate course of treatment to bring him to maximum medical improvement. The necessity for such an evaluation was emphasized by the reports of both Dr. Seres, SX 6 at 380-81, Dr. Schmidt, CX 28 at 188, and the testimony of Dr. Vessely. After such an evaluation and proper treatment for his condition, when he has reached maximum medical improvement, it will be possible to determine whether he is permanent partially or permanent totally disabled, or capable of returning to longshore work with no loss of earning capacity. See generally, 20 C.F.R. § 702.338 (requiring the administrative law judge to insure that the record is fully developed).

F. Responsible Employer

MTC argues that after the neck and back injuries Claimant sustained in 1994 and 1996, Claimant aggravated his neck and back injuries while working at the four other employers. It points to:

- the May 2, 1997 Hall-Buck incident, when Claimant stepped off of a rail car, slipped on gravel, and landed on his left hip;
- the time in June 1997, when Claimant drove a forklift at Jones Stevedoring and complained that the jolting hurt his neck;
- the work as a switchman at Columbia for two days on July 21 and 22, 1997, when Claimant wore a six pound console around his neck which irritated his neck (TR 138-39); and
- the work driving a truck at SSA when he turned his head and again irritated his neck.

MTC contends it has been exonerated from liability due to the work Claimant did for these other employers. Columbia Grain, Jones Stevedoring, and SSA all maintain that the evidence establishes MTC's liability and absolves each of them.

The applicable law provides that to avoid liability, each employer must establish by a preponderance of the evidence that another employer is responsible for the claimant's injury:

> In determining the responsible employer in the case of multiple traumatic injuries, if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury and accordingly the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. (citations omitted)

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[19]This multi-disciplinary evaluation should address the vocational factors that Dr. Davies omitted, such as whether Claimant could sufficiently function in an occupational setting and/or return to longshore work, see § II. B. 3, above. The multi-disciplinary panel should evaluat the severity of Claimant's physical and psychological condition according to the factors set out in the current edition of the *AMA Guides*.

Buchanan v. International Transportation Services, 33 BRBS 32, at 35, *aff'd. sub nom. International Transportation Services v. Kaiser Permanente Hospital*, 7 Fed. Appx. 547 (9th Cir. 2001).

MTC relies on statements made by Claimant, Drs. Berkeley, Gallegos, and Wayson to show that liability was transferred from it. MTC points first to letters from Drs. Berkeley and Gallegos, indicating that the May 2, 1997 injury aggravated Claimant's condition.

I have explained already my reasons for rejecting the argument that 25 percent of the cause for the fusion surgery Dr. Berkeley did in 1998 arose from the May 2, 1997 Hall-Buck injury, in Section II. B. 8, above. Dr. Berkeley changed his opinion after examining Dr. Gallegos' chart notes. He had been unaware of Claimant's complete medical history when he drafted his letter. SX 4 at 167-69, 171-73. Dr. Berkeley's ultimate opinion was that the 1997 work activities had no effect on Claimant's condition.

A letter from Dr. Gallegos indicated that the May 2, 1997 injury aggravated Claimant's condition. The letter was written by MTC's counsel; Dr. Gallegos was in error when he signed it. Later Dr. Gallegos withdrew this opinion and indicated that the May 2, 1997 injury had no permanent effect on Claimant's condition. He conceded that his opinion finding aggravation was not supported by his own chart notes, a very important reason for discounting that opinion. SX 7 at 465, 491, 495. His change of opinion has caused me to consider carefully the bases for opinions Dr. Gallegos expressed. Dr. Gallegos' letter is not the only evidence on this causation issue, however. Drs. Franks and Berkeley, Claimant's treating neurosurgeons, also believe no work after April 22, 1997 aggravated or combined with the MTC injury. As the final opinion expressed consistently by the treating surgeons and long term family practitioner, I am persuaded by this view.

Second, MTC points to Claimant's 1998 statement that after falling at Hall-Buck on May 2, 1997, "everything has been going downhill as far as what Dr. Franks has performed on my body." MX 15 at 233. But the statement does not establish that the May 2, 1997 injury caused Claimant's difficulties; the record indicates that Claimant's pain complaints varied depending on the amount and type of medication that he used. Isolated complaints from Claimant are relevant, but not controlling, in deciding the medical issue of causation. The heavy nature of longshore work makes it likely that a laborer will have, at times, transient aches and pains after work. I do not read the *Buchanan* rule as broadly as MTC does. It seems to believe that if a worker has a traumatic injury at a first employer, and ever reports pain in the affected body part after working for a later employer, the later employer automatically becomes the one liable for the worker's wage loss and medical benefits, since pain proves an aggravation of symptoms. The medical opinions have convinced me that the later work did not affect the Claimant's condition. Even if he had never returned to work, he would have needed the cervical re-do and three level fusion Dr. Berkeley performed in 1998. This essentially was the surgery Dr. Franks had considered and discussed with Claimant on October 16, 1996. MX 32 at 539. Claimant was never able to work after that April 1998 surgery.

The final opinions of all medical experts who addressed the issue was that none of Claimant's 1997 work activities aggravated his condition. Dr. Wayson believed that the 1997 work activities caused no permanent damage to Claimant's neck. CX 5 at 225; SX 5 at 238, 240. Dr. Berkeley opined that Claimant's 1997 work activities did not contribute to or accelerate the need for the 1998 cervical fusion. SX 4 at 193; SX 7 at 512. Rather, the 1994 injury and the cervical nonunion from the first neck surgery necessitated the 1998 cervical fusions. SX 4 at 176-77. Dr. Berkeley further opined that any symptoms that resulted from the 1997 work activities were temporary and caused no permanent damage. SX 4 at 191. Dr. Franks believed that any driving activities would more likely effect temporary, rather than permanent, symptoms. CX 16 at 97-100. He believed that a 20 to 25 pound console around Claimant's neck at work would cause only temporary symptoms as well. CX 16 at 97-98. The console actually weighs only six pounds, so there is even greater reason to doubt that wearing it had any effect on Claimant's condition. Dr. Franks discerned no pathological changes in Claimant's neck condition in 1997. CX 16 at 100. Dr. Seres concluded that Claimant's neck condition resulted from the 1994 and 1996 injuries. As he reviewed Claimant's medical records, Dr. Seres noticed that Claimant's symptoms had both improved and worsened over time and attributed this to progressive degeneration of Claimant's condition. CX 36 at 321. According to Dr. Vessely, Claimant's neck condition resulted from the 1994 injury; the 1997 work activities had no effect. Dr. Vessely pointed out that Claimant's symptoms had existed long before 1997. SX 6 at 281-83, 350, 353. As for Claimant's pain and numbness symptoms, they have persisted since his industrial injuries in 1994 and 1996, and Dr. Vessely observed from his review of the chart these symptoms often varied, depending on the type and amount of medication Claimant was taking.

I am convinced after considering the medical evidence as a whole that the only consequences of the 1997 work activities were instances of transient pain, all of which resolved without any enduring aggravation of the Claimant's condition. The only consequence of the May 2, 1997 injury at Hall-Muck was Claimant's trochanteric bursitis of the left hip, which resolved. It was a distinct condition which had no effect on Claimant's neck or back. Claimant vaguely mentioned certain activities which exacerbated his pain to Dr. Gallegos, but there is no evidence specifying particular employers or injury dates (beside the hip injury at Hall-Buck). No consequences resulted from Claimant's 1997 work activities at Columbia Grain, Jones Stevedoring, or SSA. I conclude from my review of the medical evidence that Claimant's present disability is a natural progression of the 1994 and 1996 injuries at MTC, and especially from the failed cervical fusion.

MTC did pay for Claimant's medical treatment by Dr. Franks following the 1996 injuries, and made temporary total disability compensation payments. MTC is entitled to a credit for what it paid already in compensation until Dr. Franks released Claimant to work, when temporary total disability benefits were terminated. Claimant ultimately was able to return to work in April 1997 only by being "carried" on the job by others for most of the positions he could obtain through the hiring hall. MTC is also entitled to a credit for Claimant's earnings during that period, and for the disability compensation benefits Hall-Buck paid him on account of his hip injury there. Claimant is not entitled to be paid twice for any period.

G. Modification

Claimant filed a petition for modification of his permanent partial disability benefits under Section 22 of the Act on August 20, 1999, alleging that both his neck and back injuries had worsened. With respect to the 1994 injury, Claimant has apparently abandoned his petition. Claimant maintained his petition for modification of the decision denying any permanent partial disability benefits for the 1996 injury, but the extent of the 1996 injury has been reconsidered. Because Claimant is awarded temporary total disability benefits continuing to the present, modification is no longer necessary.

H. MTC's Entitlement to Section 8(f) Relief

MTC contends that it is entitled to relief from the Special Fund pursuant to Section 8(f) of the Act. 33 U.S.C. § 908(f). The Board addressed this issue by saying: "[i]f the administrative law judge awards permanent partial disability compensation on the 1996 injury on remand, then the administrative law judge should reinstate his award of Section 8(f) relief to employer for those benefits." I have awarded temporary total disability benefits. The Special Fund cannot be liable for those. After the Claimant reaches maximum medical improvement from the combination of psychiatric and orthopedic impairments, the issue of whether MTC is entitled to § 8(f) relief for any permanent disability can be revisited.

I. Medical Expenses

Claimant argues that MTC is responsible for Claimant's medical expenses incurred since Judge Lindeman's original decision. Specifically, Claimant seeks $388.72 for treatment by Dr. Gold. CX 53 at 457. This amount includes a $25.00 charge for a missed appointment. CX 53 at 457. Claimant also seeks $1410.20 for an MRI scan, $599.67 for an ambulance ride in 1998, $174.90 for psychological treatment, and $1130.00 for massages in 2000 and 2001. CX 53 at 459A-66.

Section 7(a) of the Act requires that medical expenses assessed against an employer be both reasonable and necessary. 33 U.S.C. § 907(a); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). To establish a prima facie case for compensable medical expenses, Claimant must produce a qualified physician who states that the treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). He must also show that the medical expenses are both related to and appropriate for the compensable injury. 20 C.F.R. § 702.402; *Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130, 1138 (1981).

Dr. Gallegos has stated that the psychological treatment by Dr. Gold, the MRI scan, and the massages were necessary medical treatments related to Claimant's industrial injuries and concomitant symptoms. SX 7 at 497-98, 502. I find these expenses are reasonable, considering Claimant's 1994 and 1996 injuries have led to multiple neck and back surgeries, persistent pain, and psychological problems. Claimant has not presented any evidence that the missed appointment charge of $25.00 covered a reasonable and necessary part of his medical treatment, so I deny this expense. I also deny the $599.67 ambulance expense. Claimant contends that this expense, incurred shortly after his altercation at the union hall, arose from psychological problems

attributable to his 1996 injury. Whether the expense may have arisen from Claimant's psychological problems, it was not incurred to treat his psychological problems. More to the point, Claimant admitted that he sustained no injury and suffered no symptoms attributable to the altercation. None of the physicians have suggested that the ambulance ride was reasonable or necessary to treat Claimant for any condition. After excluding the indicated amounts, I award Claimant $3,078.82 in medical expenses.

J. The ILWU/PMA Lien

SSA contends that an issue remains regarding amounts owed to the International Longshoremen's and Warehousemen's Union/Pacific Maritime Association (ILWU/PMA) Welfare Fund, which advanced medical benefits to Claimant following his injuries. Claimant was previously ordered to reimburse the ILWU/PMA Welfare Fund, and a lien against his compensation was created in its favor. *See* 33 U.S.C. § 917. Inasmuch as neither Claimant, MTC, nor the ILWU/PMA Welfare Fund has raised this issue, I will not disturb the previous order.

ORDER

It is ordered that:

1. Claimant's petitions for modification of the Decisions and Orders of March 23, 1998, and May 6, 1998, are denied.

2. MTC shall pay temporary total disability benefits to Claimant for the January 9, 1996 injury from that date to the present. Claimant's average weekly wage was $1,170.91 at the time of his 1996 injury.

3. MTC shall pay for Claimant to undergo an in-patient multi-disciplinary evaluation to assess the combination of Claimant's psychological and orthopedic disabilities on his inability to work, and pay for medically necessary treatment identified during that evaluation.

4. MTC shall pay Claimant $3,078.82 as reasonable and necessary medical expenses.

5. MTC is entitled to credit for any previous payments of disability compensation by Hall-Buck, and for Claimant's actual earnings at Longshore employment during the period he attempted to return to work from April 1997 to July 30, 1997.

6. Interest on the amount owing is to be paid at the Treasury Bill rate in effect on the date this Decision and Order is filed by the District Director. *See* 28 U.S.C. § 1961; *Sproull v. Director, OWCP*, 86 F.3d 895, 900 (9th Cir. 1996), *cert. denied sub nom. Stevedoring Services of America v. Director, OWCP*, 20 U.S. 1155 (1997).

7. The District Director will make all calculations necessary for payment of this award.

8. Claimant may petition for attorney fees and costs within 20 days after service of this Decision and Order by the District Director, or within 20 days following the disposition of a petition for reconsideration, if one is filed under 20 C.F.R. § 802.206. The petition must be prepared on a line item basis and comply with 20 C.F.R. § 702.132. MTC may object within 20 days after receiving the petition. Objections must be noted and explained on a line item basis, or the items will be deemed accepted by MTC and allowed. Claimant may file a line item reply within 10 days after receiving any objections. Counsel for Claimant shall arrange to meet with counsel for MTC, in person, within 10 days after filing his reply, to attempt to adjust all line item disputes. They shall file a joint report the result of their meeting within 10 days thereafter, identifying the matters which remain in dispute and require a decision.

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William Dorsey
Administrative Law Judge